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IN THE

Supreme Court of the United States

October Term, 1969

No. 992

NEW YORK FEED COMPANY, INC., and
STEPHEN HELLER,

Appellants,

vs.

HOWARD R. LEARY, Individually and in his capacity as Police Commissioner of the City of New York, and FRANK S. HOGAN, individually and in his capacity as District Attorney of New York County,

Appellees.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Jurisdictional Statement

Appellants' appeal from the judgment of a three-judge District Court convened in the Southern District of New York and entered on October 15th, 1969 denying an interlocutory and permanent injunction against the appellees and other relief, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the three-judge District Court is reprinted as Appendix "A" and, as yet, is unreported.

Jurisdiction

This suit was brought under Title 28, United States Code, Sections 2281, 2284 and Title 42 United States Code, Section 1983 to enjoin the appellees from interfering with the appellants' constitutional right to distribute their newspaper and to declare Section 235 of the New York Penal Law unconstitutional as being over-broad and as being unconstitutionally applied. A three-judge court was convened pursuant to Title 28, United States Code, Section 2281 composed of Wilfred Feinberg, United States Circuit Judge for the Second Circuit Court of Appeals; and Thomas F. Murphy and Marvin E. Frankel, District Judges of the United States District Court for the Southern District of New York. The judgment of the three-judge District Court was entered on October 15, 1969 and notice of appeal was filed in that Court on October 27, 1969.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on direct appeal in this case: *Dombrowski v. Pfister*, 380 U. S. 479 (1965) and *Zwickler v. Koota*, 389 U. S. 241 (1967).

Question Presented

Where state officers have restrained the circulation of an allegedly obscene "underground" newspaper by making massive arrests of its newsdealers and by threatening to arrest many others for its sale, without holding a prior

adversary hearing on the issue of obscenity, should a Federal Court, under the requirements of the First Amendment, enjoin such conduct?

Constitutional Provisions and Statutes Involved

AMENDMENT I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 235.05 Obscenity.

New York Penal Law.

A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, an obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Section 235.10 Obscenity; presumption.

New York Penal Law.

1. A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.

2. A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

Statement

The facts relevant to the constitutional issues presented by this appeal have their origin in a series of massive

arrests of persons engaged in the sale and distribution of certain tabloid newspapers in New York City. The appellants are the New York Feed Company, Inc., the corporate publisher of *The New York Review of Sex & Politics* (hereinafter referred to as *The Review*), and Stephen Heller, 20 years of age, who is the individual publisher.

The appellees are the District Attorney of New York County, the Commissioner of Police of the City of New York, and the Attorney General of the State of New York.

The New York Review of Sex & Politics

The Review is a bona fide newspaper which has as its sole purpose the furnishing of information to the public relevant to current issues of the day. Articles in *The Review* are well written by authors of stature and, with but rare exception, they contain no socially unacceptable language. The photographs in *The Review*, although occasionally displaying men and woman in the nude, do not depict any sexual acts.

Issues number 9 and 12 of *The Review* (which were the subject of the arrests complained of here) contain articles which discuss recent motion pictures, such as *Midnight Cowboy* and *Lonesome Cowboy;* comment on New York City's war on the underground newspapers; analyse the soft drug problem in the City of New York; examine the recent homosexual revolt; criticize the war in Viet Nam; consider the use of sex today in rock and roll music; and review a recent ballet performance in New York City (C. pp. 2-8)[1].

Newsweek Magazine; in an article discussing the so-called "underground newspapers", said that *"The New York Re-*

[1] Refers to appellants' complaint in District Court where there is a complete listing of each and every article contained in Issues No. 9 and 12 of *The Review.*

view of Sex & Politics makes . . . at least some effort to run material of redeeming value (one series: *What the New York Mayoral Candidates Think About Censorship*); . . ." (C. p. 8).

Pardon Magazine, a leading German satire monthly, described *The New York Review of Sex & Politics* as the "best" of the so-called underground newspapers (C. p. 9).

Ramparts Magazine, discussing *The New York Review of Sex & Politics* said: ". . . [It] does contain some straight reporting (for example, a report on the press conference held by Teenagers for Decency) which pads as much as it informs, and appears to reflect the ambivalence of the editors, who do seem more political than some of the others" (C. p. 9).

Although the publication of *The Review* was first launched on February 1st, 1969, by June of that year its circulation had grown to over 35,000 in New York City alone (Affidavit of Stephen Heller, paragraphs 2 and 13).

The Massive Arrests and Prior Restraint

On June 26th, 1969 Stephen Heller, Sam Edwards (one of the co-publishers) and Al Druss (the President of *The Review's* distributing company, G. I. Distributors, Inc.) and a large number of newsdealers were arrested and charged with violations of Section 235 of the New York Penal Law[2] (C. p. 5). The appellants, Sam Edwards and Al Druss were all arrested on warrants issued, on an *ex parte* application made by the District Attorney to a Criminal Court Judge in the City of New York.[3] No warrants were issued for the arrests of the newsdealers. A large

[2] Section 235 makes it a crime to publish, distribute or sell an obscene publication.

[3] Affidavit of Patrolman, Donald Gray, sworn to on September 11th, 1969.

number of newsstand dealers were arrested simply because they had on display *The Review* or one of the other tabloid newspapers which were the target of similar attacks[4] (C. p. 5).

Prior to the massive arrests of June 26th there were 193 newsstands in New York County which handled *The Review* (C. p. 5). After this sweeping police action approximately 60 newsstands refused to handle the next issue of *The Review* for fear of being arrested (C. p. 5).

On August 15th, 1969 the police struck again arresting the appellant and Sam Edwards along with approximately 70 newsstand dealers for the sale of Issue No. 12 of *The Review* (C. pp. 6, 10). The same procedure was followed of securing arrest warrants for the appellants and Sam Edwards on an *ex parte* application and once again the police avoided the inconvenience of securing arrest warrants for the *70* newsstand dealers who were arrested on that same day for displaying on their stands these tabloid newspapers.[5] After the massive arrests of August 15th, which exceeded those of June 26th, only about 50 newsstands of the original 193 would handle *The Review* (C. p. 10). Of the 10,000 issues of *The Review* that were sent out to newsstands throughout New York County (Manhattan) the week after the August 15th arrests over *8,000* were rejected outright by the news dealers because they were fearful of being arrested again (C. p. 10).

As a result of the police tactics employed against *The Review* its circulation, which was once 35,000, was reduced to less than 5,000 (Affidavit of Stephen Heller, paragraph 13).

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[4] At the same time warrants of arrest were issued for *The Review* other warrants were secured, in the same manner, for the publishers of the tabloid newspapers entitled *Screw*, *Pleasure* and *Kiss*.

[5] Some of these newsdealers were blind and disabled. See affidavit of Attorney Ralph J. Schwarz, sworn to on September 30th, 1969.

The appellees, in their answer to the appellant's complaint, did not deny the drastic drop in the circulation of *The Review* but only denied knowledge sufficient to form a belief. They admitted to the arrest of at least *50* news dealers of which 25 involved *The Review* and *Screw*.[6]

Police Threats to News Dealers

In addition to the massive arrests which reduced the circulation of *The Review*, news dealers were individually threatened by New York City police officers and told not to handle any of the so-called underground newspapers or they would be arrested. This concerted effort on the part of the police is detailed in the affidavit of Dan Mouer, the circulation manager for *The Review*, and was undenied by the appellees.[7]

When the first group of arrested news dealers were brought to court, after the June 26th raids, a member of the New York County District Attorney's staff issued the following threat to the news dealers:

> I state unequivocally for the record that any individual, including all newsstand operators, who sell or offer to sell these publications, now ruled obscene acts at his own risk as the agent of these defendants and renders himself liable to swift forthwith arrest of violations of this state's obscenity statute (C. p. 6).[8]

Dan Mouer, in his affidavit, describes in great detail, giving places and locations, 26 different instances where newsstand dealers were actually threatened by the police

[6] Lieutenant Ralph Russo's affidavit dated September 23rd, 1969. In a later affidavit dated September 29th, 1969 he indicated that there were only 18 arrests of *The Review* and *Screw*.

[7] Dan Mouer's affidavit is filed with the Record on Appeal in this case.

[8] "These publications" refer to the tabloid newspapers heretofore described. The statement "ruled obscene" had reference to the *ex parte* determination of a criminal court judge.

that if they handled *The Review* they would be arrested. In his affidavit he quotes from an article in the *New York Post*, dated July 15th, 1969 which reads as follows:

> In May and June several issues of *The Reviews* were called obscene by the police, their editors arrested, as detectives fanned out across the city pulling copies of *The Reviews* off the newsstands. Several dealers were also arrested and ordered to appear in Court.
>
> When asked why they no longer carried *The Sex Reviews*, newsstand dealers, particularly in the 86th Street area, say that both uniformed and plain clothed police have warned them of the risk of arrest on obscenity charges if they sell the tabloids.

Dan Mouer clearly states that since these threats have been made to the newsstand dealers they have refused to carry *The Review*.

The affidavit of Irving Gertsman, Assistant Corporation Council of the City of New York, dated October 3rd, 1969, and offered in response to the affidavit of Dan Mouer, only complains that the information contained in the Mouer affidavit is hearsay but significantly does not deny in any fashion the facts set forth in the Mouer affidavit.

Federal Action

Because of the drastic restraints imposed upon *The Review*, which has stifled its circulation and distribution, the appellants were forced to initiate a suit under Section 1983 of Title 42 which sought to enjoin the appellees from arresting or threatening to arrest the appellants and their news dealers for the sale of *The Review* without first conducting an adversary hearing on the question of the challenged publication's alleged obscenity. A three-judge court was convened at appellants' request to assess the constitutionality of Section 235 of the New York Penal Law,

which was challenged as being overbroad and misapplied and Sections 148 through 150 of the New York Code of Criminal Procedure because they failed to provide for an adversary hearing in advance of a person's arrest for the sale of an obscene publication. The case was heard before Judges Wilford Feinberg, Judge of the United States Court of Appeals for the Second Circuit, and Thomas F. Murphy and Marvin E. Frankel, District Judges of the United States District Court for the Southern District of New York.[9]

Decision of the Court Below

On October 15th, 1969 the three-judge District Court in a lengthy opinion rejected appellants' claims that Section 235 of the New York Penal Law was overly broad and had been misapplied and held it to be constitutional.

Although recognizing that body of authority requiring an adversary hearing prior to the restraining of the circulation of literature, they elected not to follow that rule. In discussing appellants' claim that a prior adversary hearing was a constitutional prerequisite to the interruption of a newspapers' distribution the District Court specifically held:

> The argument is not merely plausible; it has won approval in several courts. *Delta Book Distributors v. Cronrich, Inc.*, ____ F. Supp. ____ (E. D. La. 1969) (three-judge court); *Cambist Films, Inc. v. State of Illinois*, 292 F. Supp. 185 (N. D. Ill. 1968); *Sokolic v. Ryan*, Civ. No. 2501 (S. D. Ga., 9-18-69).[11] But decisions we believe to be sounder, at least in the present state of learning, go the other way. *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Rage Books*

[9] At the same time *The Review* instituted its lawsuit another one of the tabloid newspapers entitled *Screw*, *the Sex Review* also brought an action under the same federal provisions. These actions were consolidated and argued together.

Inc. v. Leary, 301 F. Supp. 546 (S. D. N. Y. 1969), appeal pending; *Astro Cinema Corp., Inc. v. Mackell*, 69 Civ. 778 (E. D. N. Y., 8-19-69); *The East Village Other, Inc. v. Koota*, 68 Civ. 125 (E. D. N. Y. 2-13-68). In the respect here pertinent, we join the latter group.

The District Court further found that there was no extraordinary need to justify the granting the relief requested under Section 1983 and indicated that since appellants had not pursued their claims in the State courts Federal intervention should be avoided. Thus the Court below denied all of the injunctive relief requested by the appellants.

On October 27th a direct appeal to this Court was duly filed.

THE QUESTIONS ARE SUBSTANTIAL

I. Under the requirements of the First Amendment State officers cannot restrain the circulation of an allegedly obscene underground newspaper, by making massive arrests of its newsdealers and by threatening to arrest many others for its sale, without conducting a prior adversary hearing on the issue of obscenity.

This appeal presents a very grave question affecting a citizen's right to freely distribute a newspaper and the public's right to read it, never before decided by this Court. In other words, is this Court's ruling that the distribution of any allegedly obscene literature shall not be interrupted unless preceded by an adversary hearing on the issue of the publication's alleged obscenity, to be applied to restraints caused by massive arrests and threats to arrest made against newsdealers? This clearcut question presented here has never been decided by this Court. Thus, the

District Court below, by ignoring the adversary hearing rule, has created a new problem which this Court is obligated to resolve if the press of this country is to remain free.

The substantiality of this question is signified by this Court's noting an appeal in *Batchelor v. Stein*, No. 565 (Oct. Term 1969) wherein one of the questions presented was:

> Where "underground" newspaper publishers who face prosecution under an allegedly unconstitutional Texas obscenity statute entitled to federal injunctive relief under *Dombrowski v. Pfeister?*

Since a closely related question, if not identical, is presented by this appeal it is urged that this Court should entertain the instant appeal and hear arguments in this case with *Batchelor v. Stein*. Although the *Batchelor* case does not raise the constitutional issues in terms wholly identical to those involved here the situations are sufficiently similar to require the noting of an appeal in this case. While the *Batchelor* case involved federal intervention and the enjoining of a state obscenity statute it lacks the serious restraints imposed upon the distribution of a newspaper evident in the case at bar. Thus we urge the reasons are all the more compelling in this case for hearing our cause.

This Court has held that the distribution of any form of literature, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer *in an adversary proceeding*. *Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Marcus v. Search Warrants*, 367 U. S. 717 (1961); *The Lee Art Theater, Inc. v. Virginia*, 392 U. S. 636 (1968).

Thirty-eight years ago this Court warned the states that any previous restraints imposed upon the dissemination of any form of writing or speech which infringes upon freedom of expression is to be especially condemned. *Near v. Minnesota, ex rel. Olson*, 283 U. S. 697 (1931).

State officials have been continually admonished by this Court that the imposition of any prior restraints on the circulation of literature ". . . comes to this Court bearing a heavy presumption against its constitutional validity". *Bantam Books Inc. v. Sullivan*, 372 U. S. 58 at p. 70 (1963). Thus, it is clear under these authorities, that the states are not free to adopt whatever procedures they please for the enforcement of their obscenity laws without regard to their effect upon constitutionally protected speech.

In order to properly balance the public's right to enjoy a given form of expression against the state's right to prosecute obscenity, the adversary hearing was devised as a means of effectively adjusting these countervailing interests. Thus, today it is well settled, that an adversary hearing is a necessary constitutional predicate to the restraining of the circulation of any reading material.

It makes no difference whether the restraint imposed is caused by the state's seizure of certain publications (*Quantity of Books v. Kansas, supra*) or by the confiscation of a motion picture film (*Tyrone v. Wilkinson*, 410 F. 2d 639 [4th Cir. 1969]) or by arresting a person for the sale of a particular book (*Delta Books Distributors, Inc. v. Cronvich*,[10] Civ. 68-1927 [E. D. of La. July 14, 1969]) or by threatening that certain sanctions may be imposed if certain books are distributed (*Bantam Books, Inc. v. Sullivan, supra*) or by placing police officers in a bookstore

[10] The *Delta Book* case is precisely in point. There a three-judge court including Judges Boyle, Wisdom and Rubin held that retail book distributors could not be arrested without a prior adversary hearing.

to surveil the sales (*Bee See Book, Inc. v. Leary*, 291 F. Supp. 622 [S. D. N. Y. 1968]).

These cases teach us that once it is foreseeable that certain governmental action will restrain the free circulation of reading material, a prior adversary hearing on the issue of obscenity is constitutionally required.

An *ex parte* prior judicial determination of the alleged obscenity of the challenged work does not satisfy this constitutional requirement. *Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Potwora v. Dillon*, 386 F. 2d 75 (2nd Cir. 1967); *Tyrone v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969). For, as this Court has pointed out, only in an adversary hearing will the investigating magistrate be adequately advised of the challenged publication's legal propriety. Without such a hearing, conducted in an adversary atmosphere, books may be criminally charged, causing their sales to cease, thus making the public the real loser when later the books may be found to be constitutionally protected.

The record below clearly demonstrates a concerted effort on the part of the New York City police to stifle the distribution of *The Review* and the other underground newspapers by extrajudicial means. Significantly, newsstand dealers were only told that they could not sell the so-called underground newspapers and only those news dealers who handled those newspapers were arrested and threatened by the police. This comprehensive and menacing police campaign was focused solely on the tabloid newspapers instead of obscenity generally.

The Review's drop in circulation from 35,000 to 5,000 can only be attributed to the unleashing of this raw police power on the newsstands of New York City. This case presents a clear cut, concerted effort, on the part of the

state to suppress a newspaper, which has never been adjudicated obscene in an adversary hearing, by using the power of the state, in the form of massive arrests and threats of prosecution to inhibit its circulation.

The police are not excused from this unconscionable conduct simply because a criminal court magistrate, in an *ex parte* proceeding, examined some of these publications and determined that there was probable cause for the arrest of those responsible for its distribution. The procedure of an *ex parte* judicial investigation was expressly rejected in *Quantity of Books v. Kansas, supra.*

The District Court's suggestion that the appellants pursue their remedies in the state courts shows a misunderstanding of our grievance. Appellants' claim was not that they could not receive a fair or speedy trial in the state courts. Their complaint is that unless these illegal activities of the police are enjoined, before their newspaper perishes, their success in the criminal courts may be of no avail. In other words, appellants may win all of the battles in the state courts but still lose the war because of the newspaper's ultimate defeat by reason of the unlawful restraints inflicted upon it. The appellants have taken refuge in the Federal Court because that is the only court authorized to enjoin state officers from persisting in these unlawful practices. As a practical matter existing state remedies were found to be totally inadequate by the Second Circuit in *Potwora v. Dillon*, 386 F. 2d 75 (2nd Cir. 1967).

In *Dombrowski v. Pfister*, 380 U. S. 479 (1965) this Court acknowledged that often criminal prosecutions involve imponderables ". . . that themselves may inhibit

the full exercise of First Amendment freedoms . . . ". There the Court went on to point out that:

> The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . [f]or 'the threat of sanctions may deter . . . almost as potently as the application of sanctions' * * * The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospect of its success or failure. 380 U. S. 486, 487. (See also, *United Steel Workers of America v. Bagwell*, 383 F. 2d 492 [4th Cir. 1967].)

The restraints imposed upon this small newspaper go far beyond any ever seen by this Court before. For here, by reason of these police tactics, *The Review* is on the verge of perishing. Clearly, an adversary hearing in all likelihood would have avoided the massive arrest of newsstand dealers who were taken into custody without the benefit of arrest warrants. Such a hearing in all probability would have avoided, at the very least, the arrests of those responsible for the publication of *The Review*, described by *News Week Magazine* as the best of the underground newspapers.

The procedural lessons learned from *Quantity of Books v. Kansas, supra,* which are simple enough to apply, continue to be ignored by state officials and within the last year a number of courts have strayed from the moorings of this landmark decision. See *Rage Books Inc. v. Leary*, 301 F. Supp. 546 (S. D. N. Y. 1969); *Astro Cinema Corp. Inc. v. Mackell*, 69 Civ. 778 (E. D. N. Y. August 19th, 1969); *The East Village Other Inc. v. Koota*, 68 Civ. 125 (E. D. N. Y., February 13th, 1968). (Where a number of district courts have held an adversary hearing was unnecessary as a predicate to the imposition of restraints upon various forms of expression.)

The unconstitutional practices exemplified by this case and those cited above, always get their first footings by slight deviations from approved legal procedures. These encroachments into the precincts of protected speech can only be avoided by strict adherence to this Court's clearly defined rule, requiring a prior adversary hearing before the circulation of literature can be disturbed.

The situation is thus one where New York prosecutors and police need to be reminded that the constitutional standards and protections announced by this Court in *Quantity of Books v. Kansas, supra*, are applicable to the case at bar and have not been relaxed or repealed. The decision below, in short, will undoubtedly be taken by state prosecutors as a signal that this Court's prior decisions respecting First Amendment protections no longer need be respected or followed. Such a decision is bound to invite widespread abuses which under the First Amendment simply cannot be tolerated.

The only effective way to guarantee to a citizen the benefits of this procedural safeguard is by enjoining state officers from acting without observing it. By the time the appellants have a trial on their complaint in this action or litigate their criminal cases in the criminal courts—it will be too late. For by then their newspaper may well be destroyed.

For all of these reasons the Court should hear this appeal and the judgment of the Federal District Court should be reversed.

II. Section 235 of the New York Penal Law violates the First Amendment to our Federal Constitution because it fails to contain the standards established by this Court for judging obscenity and because it includes a presumption which substantially interferes with the defendant's presumption of innocence and privilege against self-incrimination.

In *Redrup v. New York,* 386 U. S. 767 (1967) this Court held that where a publication was not sold to a juvenile, or published in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, nor pandered, that "the distribution of the publication . . . is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam or in rem*". (386 U. S. at p. 769).

While the *Redrup* case was pending, this Court's docket had become cluttered with a large number of obscenity cases, involving a wide variety of materials, which were awaiting decision. After the advent of the *Redrup* decision, on June 12th, 1967 this Court, by its per curiam action in all of these pending cases, swept away some fifteen obscenity convictions, holding constitutionally protected a wide range of materials including paperback novels, nudist and girly magazines, and motion picture films.[11]

In each of these cases the given form of expression had not been sold to a minor, foisted upon an unwilling public or pandered.

By this Court's sweeping action we were left with the inescapable conclusion that any magazine, book, photograph, or motion picture film; which is not sold to a minor, or foisted upon an unwilling public or pandered is con-

[11] This Court's Journal of Proceedings, United States Law Week, June 12th, 1967, Vol. 35 at pp. 3433 through 3436.

stitutionally proctected.[12] This conclusion, drawn from the *Redrup* opinion and the *per curiam* opinions that followed, was confirmed on April 7th, 1969 when this Court decided *Stanley v. Georgia*, 394 U. S. 557, 89 S. Ct. 1243 (1969). Although this Court specifically held in *Stanley* that mere possession of obscenity cannot be made criminal, it went on to state:

> *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* or any other decision of this Court reaches that far. 394 U. S. at p. , 89 S. Ct. at p. 1247.

This Court there suggested that the state's powers to regulate obscenity must be confined to ". . . obscene material [which] might fall into the hands of children . . . or that [which] . . . might intrude upon the sensibilities or privacies of the general public". 394 U. S. at p. , 89 S. Ct. at p. 1249.

Thus, in light of this Court's holdings, it seems clear that the states' power to restrict what the public may read is constitutionally limited to those materials which are either sold to a minor, pandered, or foisted upon an unwilling public. Absent one of these factors the public's right to read what it pleases cannot be intruded upon by the states.

This Court also acknowledged in *Stanley* that the right to possess what is conceded to be obscene, must be accom-

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[12] United States District Court for the District of Maryland sitting *en banc* reached the same conclusion in *United States v. 4,400 Copies of Magazines*, 276 F. Supp. 902 (1967); see also *United States v. 127,295 Copies of Magazines*, 295 F. Supp. 1186 (D. Md. 1968); *Grant v. United States*, 380 F. 2d 748 (9th Cir. 1967); *Poulas v. Rucker*, 288 F. Supp. 305 (M. D. Ala. 1968).

panied by the right to receive such material. The Court in *Stanley* stated:

> This right to receive information and ideas, regardless of their social worth, . . . (citing authorities) is fundamental to our free society. 394 U. S. at p. , 89 S. Ct. at p. 1247.

The right to possess and receive would be meaningless without the corresponding right to sell and distribute absent, of course, a sale to a minor; pandering of the merchandise; or foisting it upon an unwilling member of the public.

When this Court spoke of the state's interest in controlling the distribution of obscenity it could have only had in mind those areas previously defined in *Redrup, i.e.*, sale to minors; pandering of a publication or foisting it upon an unwilling public. For to say that a person has a right to possess and receive obscenity but that he cannot buy it would be to emasculate that right.

Since Section 235 of the New York Penal Law lacks these strict limitations and makes criminal the sale to adults of materials deemed by the state to be obscene, it unconstitutionally interfers with the public's right to ". . . receive information and ideas, regardless of their social worth . . .". The only form of a state obscenity statute which can now pass constitutional muster under *Stanley v. Georgia* is one whose limitations on the distribution of obscenity are strictly confined to sale to minors; pandering; or the foisting of material upon an unwilling public. Since the New York statute fails to contain these requirements it is constitutionally deficient and must be so declared.

The Presumption of Knowledge

Section 235.10 of the New York Penal Law provides in part:

> A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.

Under this statutory presumption the burden of proof is shifted to the defendant and he must come forward and prove that he did not have knowledge of the publication's contents and character.

In *Leary v. United States*, 395 U. S. 6 (1969), this Court discussed in some detail the constitutional validity of such a statutory presumption. Quoting from one of its earlier cases, this Court restated the rule by which the constitutionality of such a presumption must be measured as:

> "Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. 89 S. Ct. at p. 1546."

Employing that test, this Court struck down the presumption relating to a defendant's knowledge of illegally imported marijuana contained in Section 176(a) of Title 21 of the United States Code as being unconstitutional.

Applying that same test to the case at bar, it is clear that there is absolutely no rational basis for presuming that

a bookstore owner, news dealer, wholesaler, or for that matter publisher, would know the contents of all of the books he sells, distributes or publishes. On the contrary the more rational presumption is that a newsdealer, bookstore owner, distributor or publisher would have no knowledge of the contents or character of all of the material that he sells, distributes or publishes.

It is illogical, irrational, and unreasonable to presume that the owner of a bookstore knows the contents of every book on his premises or that a distributor has knowledge of everyone of more than what might be a million books located in his warehouse or for that matter that a publisher knows the content and character of the hundreds of books that he may publish every year.

The Court below avoided this question by claiming there had not been a sufficient factual investigation of the logic of such a presumption as was apparently done in the *Leary* case. It is urged that no such factual investigation was necessary for common sense tells us a bookstore owner or distributor could not possibly have knowledge of all of the books on his premises. The unlikelihood of such knowledge formed the very basis of this Court's decision in *Smith v. California*, 361 U. S. 147 (1959).

Conclusion

The right to publish a newspaper and its availability to the public cannot be made to depend upon the popularity of the ideas it expresses. To be sure, what *The Review* had to say, for the most part, displeased those in places of authority. But when men in this country were given the right, under our First Amendment, to freely speak their minds, it was expected that their speech would not always be agreeable to those in power.

There is no way of telling how many critics of our democracy are needed to help keep it vital. We do know that there have never been enough. *The Review* is one of a dwindling number of dissenters. On the other hand, the "silent majority" has never sought nor needed this Court's help. *The Review*, whose very life is at stake here, does seek this Court's protection. To turn away from them now will, in effect, give legal sanction to what was done here and will inevitably have an anguishing impact upon a free press.

The terrorizing of these newsdealers by the police, in an effort to wipe out this newspaper, offers an ominous omen of what will come if these practices are not judicially supervised. For the real danger to a free people, in approving these police tactics, lies not so much in the regrettable loss of one more dissenter, but in what it may silence and leave unsaid by others who disagree with our government's policies. We must have a free press for all or we may ultimately have it for none.

For all of these reasons it is urged that the questions presented by this appeal are substantial and deserve to be heard by this Court.

Respectfully submitted,

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APPENDIX

Decision of United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILKY WAY PRODUCTIONS, INC., *et al.*,
Plaintiffs,

against

HOWARD R. LEARY, *et al.*,
Defendants.

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69 Civ. 3638

NEW YORK FEED CO., INC., *et al.*,
Plaintiffs,

against

HOWARD R. LEARY, *et al.*,
Defendants.

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69 Civ. 3808

Appearances:

Ralph J. Schwartz, Jr., Esq., New York, New York, Attorney for Plaintiffs, Milky Ways Productions, Inc., *et al.*

Herald Price Fahringer, Esq., Buffalo, New York, Attorney for Plaintiffs, New York Feed Company, Inc., *et al.*

Hon. J. Lee Rankin Corporation Counsel of the City of

New York, Attorney for Defendant, Howard R. Leary, Irving Gerstman, Esq., Of Counsel.

Hon. Frank S. Hogan, District Attorney of New York County, *Pro Se*.

Michael R. Juviler, Esq., Assistant District Attorney, Herman Kaufman, Esq., Assistant District Attorney, Of Counsel.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York.

Charles A. LaTorella, Jr., Esq., Assistant Attorney General of the State of New York, Of Counsel.

Before:

Feinberg, Circuit Judge, and Murphy and Frankel, District Judges.

FRANKEL, D. J.

This three-judge court has been convened to consider applications for injunctive and other relief by plaintiffs in two consolidated cases who assert that their rights under the First Amendment, as it applies via the Fourteenth, are being infringed by state arrests and prosecutions on obscenity charges.

In one case plaintiffs are Milky Way Productions, Inc., and two of its officers, engaged in publishing a weekly tabloid called "Screw, The Sex Review." The other suit is brought by New York Feed Company, Inc., and Stephen Heller, who published a bi-weekly tabloid entitled "The New York Review of Sex & Politics." Defendants in both cases are Howard R. Leary, Police Commissioner of New York City, and Frank S. Hogan, New York County District Attorney.

The publishers of "Screw", in their complaint filed August 18, 1969, charge that defendants, in May of 1969,

"embarked upon a plan and series of acts the purpose and effect of which has been to suppress the public sale of several issues of subject tabloid newspaper and to deprive the public of its right to read the tabloid and now threatens to suspend completely the publication and dissemination of subject tabloid." Specifically, it is charged, plaintiffs Goldstein and Buckley were arrested in May and charged with violating New York Penal Law § 235.05[1] by promoting Issues No. 14 and and No. 15 of "Screw." Thereafter, the complaint continues, the plaintiffs were advised by their counsel that "the only real basis to justify the arrests" was found in certain pictures, and they "proceeded in subsequent Issues to eliminate those pictures which apparently were deemed or appeared to be most objectionable."

Nevertheless, it is alleged, Goldstein and Buckley were arrested again on June 26, 1969, again on charges under § 235.05, because of their Issue No. 17. At the same time, "the distributor and several newsdealers" were arrest for promoting this issue. Moreover, plaintiffs charge, since May 21 "defendants, and particularly members of the Police Department, told, advised and threatened newsdealers and others that they would be arrested for selling any Issue of the publication Screw, including, of course, Issue No. 18 which was not subject to any process, civil or criminal."

As a result of these official actions, plaintiffs allege, sales of their Issues 18 and 19 have dropped from a former level of 75,000 to about 17,000. And this has happened, they say, even though "defendants * * * are or should be fully aware that Issues No. 17, 18, 19, 20 * * * did not and

[1] "A person is guilty of obscenity when, knowing its content and character, he * * * [p]romotes, or possesses with intent to promote, any obscene material * * *." Effective September 1, 1969, the statute was amended in minor respects not pertinent here.

do not contain pictures falling within the definition of hard-core pornography, to wit: pictures showing a consummated sexual act."

The complaint goes on to allege "still further arrests" on August 15, 1969, for promoting Issues 22 through 24.

According to the complaint, defendants have been asked, but have refused, to employ alternative procedures, such as civil injunctions or informal advance consultations with plaintiffs, in lieu of criminal charges under the obscenity statute.

As a result of the acts alleged, plaintiffs say, their business is being destroyed and First Amendment freedoms are being chilled. Allegedly lacking any other adequate remedy, they seek (in addition to damages) injunctive and declaratory relief of kinds, and on grounds, more particularly stated below.

Plaintiffs in the second case, publishers of "The New York Review of Sex & Politics," plead a similar cause, with some variations. On June 20, 1969, they allege, plaintiff Heller, "among others," was charged with violating Penal Law § 235.05 on the basis of the "Review's" Issue No. 9. In addition to Heller, Alvin Druss, principal of a distributing company, and "a number of newsstand dealers" (not named) are alleged to have been arrested. Circulation of the "Review" has dropped from 40,000 to 30,000. 193 newsstands carried it before June 20, but the number has since decreased to about 75. It is alleged that Heller was arrested again on August 15, 1969, this time for Issue No. 12 of the "Review." On this occasion, it is alleged, "some 70 or less [sic][2] newsstand dealers, some of whom are blind,

[2] The adverb apparently licensed suggest that the word "less" pushes the approximation too far for accuracy.

others who are handicapped and disabled," were also arrested. Unlike the complaint about "Screw," that concerning the "Review" makes much of the allegedly "tasteful" and otherwise valuable aspects of the publication, but this dubiety turns out to have little or no significance for purposes of the questions before us.

The alleged pattern of arrests, said to be pursued "recklessly and promiscuously," is assailed as an "effective prior restraint" forbidden by the Federal Constitution. Moreover, plaintiffs allege, with arrests being made before there has been an adversary ruling on obscenity, "defendants are acting in bad faith in that they are attempting to accomplish, and are in fact accomplishing, by extra judicial means what could not be achieved if the legal processes were followed." As in the companion case, plaintiffs connected with the "Review" seek both damages and injunctive relief.

By motions returnable on September 16, 1969, both sets of plaintiffs have applied for relief *pendente lite*. While the motions are not identical, the sum total of the relief sought and the contentions raised by both may be outlined as follows:[3]

(1) Temporary injunctions are sought

(a) to forbid arrests unless there has first been an adversary hearing before a judicial officer to determine whether the publications in question are obscene;

[3] Neither plaintiff joins in all the arguments or prayers of the other. The "Review" plaintiffs, for example, did not move initially for declaratory relief. The "Screw" plaintiffs have not joined in the attack upon the statutory presumptions, considered under "IV," *infra*. It simplifies things a little, however, and harms no one, to cumulate the several subjects in a single summary and treat them *seriatim* later on.

(b) to require that defendants negotiate and "pinpoint" alleged qualities of obscenity before instituting criminal proceedings;

(c) to forbid threats of arrest or warnings by police officers to newsdealers that sale of the publications will or may lead to arrest.

(2) Declaratory rulings are requested invalidating N. Y. Penal Law § 235 in several respects hereinafter detailed.

(3) Likewise, a declaration is sought that §§ 148-150 of New York's Code of Criminal Procedure are unconstitutional facially and as applied because they assertedly allow suppression of publications as "contraband" without a prior adversary hearing, contrary to the claimed protections of the First and Fourteenth Amendments.

(4) The convening of a three-judge court is urged—successfully, as this opinion indicates.

Defendants for their part have been permitted to cross-move for dismissal of the complaints, plaintiffs having waived the normal notice requirements.

In the papers filed for and against the motions, the broad outlines of the complaints are retraced, but with some notable modifications and additions. The alleged dates of arrests and the affected issues of the two publications are confirmed in the affidavits. The total of arrests appears to be sharply diminished; despite the bland assertion of undocumented numbers in plaintiffs' papers (with no detail and no ultimate weight even as affidavits go), we are able to find not more than 13 arrests for all affected issues of "Screw" and 5 for the affected issues of the "New York Review."

As against the complaint allegations that plaintiffs are being crushed by delayed vindication of their First Amendment rights, it has been shown without dispute that plaintiffs have acquiesced since May and June in the postponement of the pending state criminal proceedings. They have neglected during a summer and beyond to press for their right to speedy state adjudications or even to raise in the state courts the issues of constitutional law they want this court to decide.

Upon the foregoing facts, for reasons which follow, we have concluded that plaintiffs' motions must fail but that their complaints, if only narrowly, should survive defendants' motions to dismiss.

I.

Assuming in plaintiffs' favor a negative answer to the question whether 28 U. S. C. § 2283[4] applies to cases like this one, *cf. Dombrowski v. Pfister*, 380 U. S. 479, 484 n. 2 (1965); and see *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175, 1178 (S. D. N. Y. 1969), appeal pending, no sufficient case is made for an injunction. To begin with, plaintiffs' claim founders because they cannot show the extraordinary need required to justify such rare interferences with state criminal processes. Their heavy burden is to demonstrate that this is one of the "exceptional cases" where this kind of relief is essential "to prevent irreparable injury which is clear and imminent * * *." *Douglas v. City of Jeannette*, 319 U. S. 157, 163 (1943); and see cases collected in *Richardson v. Dudley*, 295 F. Supp. 181, 185 (S. D. N. Y. 1969) (three-judge court). The burden is not met by plaintiffs

[4] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

such as these who have had an available state forum for their claims over a period of three or four months, have been entitled to speedy adjudications in that forum, *Freedman v. Maryland*, 380 U. S. 51 (1965), and have chosen simply to bypass that avenue of relief in favor of seeking federal intervention,[5] If such delay and disregard of state processes pending the arrival of self-inflicted "emergencies" could meet the test for a federal injunction, the abrasive device would promptly lose its "exceptional" character and would become a commonplace irritant.

Apart from the problem of fatal delay, plaintiffs' prayer for an injunction lacks the central element of *Dombrowski*, the basic case they invoke—namely, a substantial indication of "bad faith" in the pending state prosecutions. See *Cameron v. Johnson*, 390 U. S. 611, 619 (1968); *id.* at 623 (dissent); *Robinson v. Bradley*, 300 F. Supp. 665, 667 (D. Mass. 1969) (three-judge court). While there is a passing allegation of "bad faith" in the moving papers for "Screw" (Schwarz affidavit at 8), and the same phrase appears in the "Review" complaint (par. 34), the plaintiffs consistently deny that they must show "bad faith" prosecution. It is evident, moreover, that their use of the quoted words has a special and inapposite meaning—to describe the omission of adversary proceedings before arrest, which is a separate subject to be considered below.

In any event, the requisite bad faith has not been shown. In fact, beginning with the prosecutions of the "Screw"

[5] Plaintiffs do not show inadequacy of the state procedures in any material sense. *Cf. Potzsora v. Dillon*, 386 F. 2d 74 (2d Cir. 1967). They say that vindication of their attacks upon the state statutes in the pending criminal cases will not serve to terminate or prevent other prosecutions. In the absence of a demonstration that defendants would persist in proceeding upon invalidated statutory premises, we should not and will not assume it. This is sufficient answer even apart from our doubts that the state scheme of remedies is as barren as plaintiffs say it is.

people in May, the papers and the oral submissions give a convincing picture of careful, discriminating prosecutions in *good faith*. Counsel have been enormously circumspect on the subject, but the strong inference from what they do say is that the copies of "Screw" underlying the May charges closely approached the badlands of "hard-core pornography."[6] Similarly, there is nothing beyond bald assertion to indicate that defendants have brought charges or made arrests based on issues of the "Review" while knowing their accusations could not be sustained.[7]

This leaves the prayer for declaratory relief, a distinct subject under cases like *Zwickler v. Koota*, 389 U. S. 241 (1967), and *Cameron v. Johnson*, 390 U. S. 611 (1968). The cited decisions indicate that declaratory relief may be available even if an injunction is not where non-frivolous claims of vagueness or overbreadth are lodged against a statute touching First Amendment freedoms. Even those decisions, however, leave largely intact the long-standing

[6] Tying this to their argument that the prosecution ought to arrange a system of advisory opinions, plaintiffs in the *Milky Way* case tell us they realized there were pictures in the May issues which could lead a good faith prosecutor to a determination of hard-core pornography. This was remedied, plaintiffs tell us. They proceed then to submit copies of the latter, supposedly "purified" issues, which have also led to prosecutions, but none of the May numbers. The later items before us, whether "obscene" or not (which we are not asked to decide), contain noticeable amounts of naked people, flaunted genitalia, and suggestive postures, all in an environment of sophomoric smut that somebody may have thought to reflect liberated sophistication. Anatole France may not have deserved the strictures, but Mr. Justice Holmes would not even have wasted on this stuff the observation that this "sex talk has none of the charm of really felt lubricity." 1 *Holmes-Laski Letters* 414 (Howe, ed., abr., Atheneum 1963). Since we have not been told in September what was in the admittedly lustier pages of May, we find no joy or utility in guessing. It is enough that the whole picture reflects nothing to suggest the "hopeless" prosecution solely for harassment which is the essence of *Dombrowski*-style bad faith.

[7] Further claims for injunctive relief have been noted and found frivolous, at least on the showing now before us. The alleged pattern or "scheme of "threats" is not even adumbrated by the scattered (and disputed) instances reported by affiants who appear to have been shouting the assertedly repressive remarks. The contention that prosecutors must consult or negotiate before bringing obscenity charges—whether or not the idea might point toward a useful form of collaboration—is without basis in constitutional law.

declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank*, 333 U. S. 426, 431 (1948), quoted in *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 462 (1952). There is no indication that every issue in a state proceeding affecting areas of First Amendment concern is an automatic candidate for duplicative and potentially conflicting decision in a concurrent federal suit for declaratory relief.[8]

In an effort to harmonize the general principles of discretion with the special forms of First Amendment protection implemented by *Zwickler* and *Cameron*, we conclude that the safeguards of vagueness and overbreadth—available to any suitor within the seeming reach of the state enactment, *N. A. A. C. P. v. Button*, 371 U. S. 415, 432 (1963); *Thornhill v. Alabama*, 310 U. S. 88, 97-98 (1940); *Winters v. New York*, 333 U. S. 507, 518-20 (1948)—are permissible for declaratory relief. Cf. *Robinson v. Bradley*, *supra*, 300 F. Supp. at 369. On this thesis, we will render a declaration on the subject covered under Point II, *infra* (facial unconstitutionality of Penal Law § 235). For comparable reasons, we regard the claimed right to an adversary hearing before arrest (Point III, *infra*), but not the complex mix of fact and law involved in the contention that the presumptions in Penal Law § 235.10 must be deemed "irrational" and therefore unconstitutional (Point IV).

[8] It is suggested that both *Zwickler* and *Cameron* may well be distinguishable in that neither involved long-pending state proceedings like the one here. There may be *pending* state case at all, but only a threat, requiring a conversion by state counsels and leaving the problem [illegible] involved. In *Cameron* state arrests on [illegible] by those of the federal suit three days later

II.

The substantive portions of Penal Law § 235 are attacked on three grounds, all of which we hold to be mistaken.

(1) The main claim is that the definition of "obscene" in § 235.00(1) is invalid on its face because it embodies only the three "tests" set out in *Memoirs v. Massachusetts*, 383 U. S. 413, 418 (1966), as derived from *Roth v. United States*, 354 U. S. 476 (1957), and intervening cases. Two more "tests," plaintiffs assert, were added by *Redrup v. New York*, 386 U. S. 767 (1967)—that there be "pandering" and "foisting upon an unwilling public."

Plaintiffs misread the *per curiam* opinion in *Redrup*. As shown by the fuller opinions from which they derive, the supposedly additional, and allegedly essential "tests" are only *permissible* kinds of relevant *evidence* which may serve in a close case to tip the balance toward a finding of obscenity. The basic thought appears first in separate opinions of Chief Justice Warren. See *Roth*, 354 U. S. at 495 (concurring opinion); *Jacobellis v. Ohio*, 378 U. S. 184, 201 (1964) (dissent). It takes firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering the Court's judgment in *Memoirs*, *supra*, where he said (383 U. S. at 420):

> "On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."

The idea reaches full bloom with Mr. Justice Brennan's majority opinion in *Ginzburg v. United States*, 383 U. S. 463, 470-473 (1966) (evidence of "pandering is relevant to the application of the *Roth* test" *id.* at 471)."

Nothing in *Redrup* changes the scope or effect of these added "tests." There is no support in that or any other decision of the Supreme Court for the view that they must be satisfied *in addition* to the three tests of *Memoirs* before a finding of obscenity is permissible. The standard as laid down in *Memoirs* was cited with approval as recently as *Stanley v. Georgia*, 394 U. S. 557, 568 (1969). For a view of the precedents similar to ours, see *United States v. 37 Cartons of Magazines*, 300 F. Supp. 851, 853-54 (N. D. Cal. 1969).

It bears mention, however, that plaintiffs are not alone in their contrary thinking. In *United States v. Four Copies of Magazines, Etc.*, 276 F. Supp. 902 (D. Md. 1967), the five Judges of the District of Maryland, sitting *en banc*, unanimously ruled for the claimant in a condemnation case under section 305 of the Tariff Act of 1930, 19 U. S. C. 1305, on the explicit ground that *Redrup* has added cumulative, and therefore narrowing, "tests" of obscenity. While it found the magazines before it the lewdest it had ever considered, appealing more blatantly than any before to prurient interest, and devoid of social value, the Court held it impossible to sustain forfeitures for obscenity. Explaining what it saw as the decisive impact of *Redrup*, the Court said (at 904):

"Mr. Justice Harlan, dissenting in *Redrup*, read the majority views as the 'simplest test * * * is constitutional doctrine' rather than 'a statutory gloss * * *.' *Id.* at 771-772. He evidently does not help the plaintiffs here. The effect of the doctrine as he saw it *vel non* was to provide an avenue toward a finding of obscenity which would otherwise not exist. He found it serving, in other words, to narrow, not broaden, the area of First Amendment protection. There is no basis for a position that state legislatures are required to incorporate such restrictive approaches in their statutes regulating obscenity.

"It appears * * * that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.

"Since the magazines involved in the present case have not yet been admitted into the United States, we cannot be sure how they will be marketed—(a) whether they will be sold to juveniles, either by mail solicitation or over the counter, (b) whether they will be offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, and (c) whether they will be offered for sale in a manner which will amount to pandering.

"This Court is, therefore, of the opinion that it cannot order the condemnation and forfeiture of these magazines at this time. On the other hand, this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in *Ginzburg v. United States*, 383 U. S. 463 at 465-466, 467, 470-471, 474-476, 86 S. Ct. 942, 16 L. Ed. 2d 31, they would not be entitled to the protection of the First Amendment. See *Pinkus-Alberg v. State*, 1 Md. App. 591, 232 A. 2d 264, 271 (1967)."

See, likewise, *United States v. 127,295 Copies of Magazines, Etc.*, 295 F. Supp. 1186, 1188-89 (D. Md. 1968) (Thomsen, C. J., and Northrop, J.); and see *Grant v. United States*, 380 F. 2d 748 (9th Cir. 1967); *Paulos v. Rucker*, 288 F. Supp. 305, 307 (M. D. Ala. 1968) (interpreting *Redrup*, and the reversals without opinion in its wake, "as indicating that it is indeed a rare book that, solely on the basis of its content, is not entitled to constitutional protection").

Having attended respectfully to the apparent holdings in the Maryland District Court and the somewhat parallel

observations elsewhere, we adhere to the position that the New York statute survives the opinion of *Redrup*.[19]

(2) We can give shorter shrift to the argument that the New York State Legislature was bound to limit its proscriptions to "hard-core pornography" after the decision in *People v. Richmond News*, 9 N. Y. 2d 578, 216 N. Y. S. 2d 369 (1961), which so confined the statute then in effect. The Federal Constitution nowhere commands any such state judicial supremacy. The States are free, of course, by whatever organs they chose, to give wider freedom for expression than the First and Fourteenth Amendments require. See *Mishkin v. New York*, 383 U. S. 502, 507-508 (1966); Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms*, 4 Vand. L. Rev. 620, 642 (1951); *cf. Johnson v. New Jersey*, 384 U. S. 719, 733 (1966). They are not perpetually bound by experiments in that direction.

(3) The attack upon § 235 as void for vagueness is frivolous. *Roth v. United States* sustained the bare word "obscene" against a similar assault. See 354 U. S. at 491-92. New York's detailed definition renders its statute more clearly impregnable.

III

The argument that there must be an adversary hearing before an arrest for obscenity is made in two forms: (1) as an attack on N. Y. Code Crim. Proc. §§ 148-150, an asserted subject for three judges, and (2) as a simple claim of official lawlessness, cognizable by one judge. Version No. (1) invites us to an area that "abounds with slippery

[19] At the same time, we find enough in the way of utterly respectable disagreement to reject defendants' idea that plus three judge court be dissolved because no question of sufficient substance instituted its convening.

distinctions," Wright, *Federal Courts* 164 (1963)—namely, "between a petition for an injunction on the ground of the unconstitutionality of the statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court." *Ex parte Bransford*, 310 U. S. 354, 361 (1940). In the view we have taken, since there is three-judge jurisdiction on other grounds (see note 10, *supra*), we need not wade into this morass. See *Florida Lime Growers v. Jacobsen*, 362 U. S. 73, 80-81, 84 (1960), and cases there cited. Accordingly, we can and do go directly to the asserted requirement of a preliminary adversary hearing and decide the essentially identical question under either formulation—whether such a novelty is mandated by the First Amendment.

While what plaintiffs propose is indeed a relative "novelty," their argument is not without arguable connection to established principles. Plaintiffs rely upon the decisions which have condemned mass, or broadly effective, seizures of allegedly obscene writings without a prior adversary hearing. *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Marcus v. Search Warrant*, 367 U. S. 717 (1961); *Bethview Amusement Corp. v. Cahn*, ___ F. 2d ___ (2d Cir. 1969); *Tirone, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Metzger v. Pearcy*, 393 F. 2d 202 (7th Cir. 1968). A "prior restraint" is also effected, plaintiffs say, when arrests are made—particularly multiple arrests for promoting the same publication—because this inhibits others from continuing to distribute the materials. And so, the argument concludes, there must be an adversary hear-

ing and judicial determination preceding the inception of the criminal process.

The argument is not merely plausible; it has won approval in several courts. *Delta Book Distributors v. Cronin*, Inc., ___ F. Supp. ___ (E. D. La. 1969) (three-judge court); *Combat Films, Inc. v. State of Illinois*, 292 F. Supp. 185 (N. D. Ill. 1968); *Sokolic v. Ryan*, Civ. No. 2501 (S. D. Ga., 8-18-69).[*] But decisions we believe to be sounder, at least in the present state of learning, go the other way. *Tarnac, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Bare Books Inc. v. Leary*, 301 *F. Supp.* 546 (S. D. N. Y. 1969), appeal pending; *Astro Cinema Corp., Inc. v. Mackell*, 68 Civ. 778 (E. D. N. Y., 8-19-69); *The East Village Other, Inc. v. Kuh*, 68 Civ. 125 (E. D. N. Y., 2-13-68). In the respect here pertinent, we join the latter group.

It is of interest in this connection, if by no means, decisive, that plaintiffs' theory, if accepted, would have invalidated both federal and state convictions under obscenity statutes which have in the recent past been upheld by the Supreme Court. *Ginsberg v. New York*, 390 U. S. 629 (1968); *Mishkin v. New York*, 383 U. S. 502 (1966); *Ginzburg v. United States*, 383 U. S. 463 (1966). A point of greater importance, both as a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the "chill" or the "prior restraint" against which they contend. It does not appear that there were any arrests in the present cases before a judicial officer had scrutinized the materials and determined that warrants

[*] The fact in the cited cases is distinguishable from ours in that each involved arrests coupled with seizures of allegedly obscene material. No seizures occurred in the cases before us. Nevertheless, as is highlighted by Judge Rubin's partial dissent addressed to this aspect of the *Delta Book Distributors* case, the court in each instance was persuaded to enjoin further criminal proceedings in addition to granting separable relief from the unlawful seizures.

should issue. All that, like the proceedings of a grand jury, was accomplished *ex parte*—without either the possible benefit to the accused or the potentially "chilling" effect upon others of adversary proceedings. The result, at least in terms of history, is to avoid any traditional form of "prior restraint" because the first overt impact upon the allegedly protected area comes at a time when all the protections and favorable presumptions of the criminal process are available to the defendant. *Cf. Near v. Minnesota*, 283 U. S. 697, 713-14 (1931).

This is not to blink at the undeniable fact that arrests and prosecutions are likely to deter activities of the kind against which they are directed. The very existence of criminal sanctions for forms of expression, especially when the standards of liability are such vexed questions at the highest judicial levels, must have some appreciable tendency of the same type. See *Smith v. California*, 361 U. S. 147, 154-55 (1959). The point remains that the inhibitions are not avoided by the new procedure plaintiffs want; they are, if anything, pushed back to an earlier time of open contest when the burden of litigation and a species of readier "defeat" are likely to work their deterrent effects.

It is inappropriate, we think, to "weigh" (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the departure they urged are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity. See

Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 69-70 (1963); *id.* at 72-73 (Douglas, J., concurring); *Freedman v. Maryland*, 380 U. S. 51, 58-59 (1965); *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 441-43 (1957); *Near v. Minnesota*, 283 U. S. 697, 713-15 (1931). *Bantam Books, supra*, upon which plaintiffs rely, reminds us specifically that procedures short of prosecution, intended as potential substitutes, may be less acceptable than the standard proceeding that begins with complaint, information or indictment as the first, non-adversary determination.

At any rate, we find no warrant in the First Amendment or the cases that give it full meaning for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal procedures affecting obscenity cases.

IV.

Plaintiffs New York Feed Company and Stephen Heller make the contention (not made by the *Milky Way* plaintiffs) that N. Y. Penal Law § 235.10 is unconstitutional because it contains the following presumptions:

> "1. A person who promotes obscene material, or
>
> "2. A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same."

The argument is made in brief, bland, conclusory terms, merely citing *Leary v. United States*, 395 U. S. 6 (1969), for the general test of presumptions, but offering no semblance of factual material of the kind essential to such a submission. We do not reach the merits of what may be,

on proper submissions in a proper forum, a subject of some interest.

The question tendered under this heading relates to the "rationality"—the sufficient probability—of a posited relationship between one fact (or set of facts) and another. *Tot v. United States*, 319 U. S. 463, 466-67 (1943); *United States v. Romano*, 382 U. S. 136, 138-39 (1965); *United States v. Gainey*, 380 U. S. 63, 66-67 (1965). The problem is "highly empirical" in its nature. *United States v. Gainey, supra*, 380 U. S. at 67. Its solution entails the exploration of facts which a legislature has either investigated or otherwise learned about, *id.* at 65; *Leary v. United States, supra*, 395 U. S. at 38, and which judges cannot notice or pretend to know better merely because of their isolated offices. So, for example, in *Leary*, upon which plaintiffs pitch this contention, the Court explored reams of factual material (*id.* at 39-43, 45-52), and relied upon a district court *record* made before a judge concerned with the same problem. *Id.* at 42, 43, 48, 50, 51, 53.

Here, plaintiffs merely assume facts, contrary to what the New York Legislature assumed, and announce the latter's irrationality. This does not begin to sustain their position. To mention only one other ally of the Legislature, the American Law Institute, not regularly charged with irrationality, adopted some years ago presumptions which are substantially like the ones here and which very likely are the source of the latter. ALI, Model Penal Code § 251.4(2), Proposed Official Draft, p. 238 (1962); *id.* § 207.10 (5), (7), Tent. Draft No. 6 at 3-4 (1957); see N. Y. Penal Law § 235.10, Practice Commentary (McKinney's 1967).

The decisive point for our purposes is that the question is not a suitable one for federal declaratory relief when

if is open in state proceedings which have been pendi
for several months. This is not a clear, unalloyed, "pure
question of law like vagueness or overbreadth. It is n
a question on which there is no possibility "of a constru
tion by the state courts that would avoid or modify th
constitutional question." *Zwickler v. Koota*, *supra*, 38
U. S. at 249. It is, instead, a question on which factua
investigation may serve as a basis for judicial interpreta
tions and definitions which are proper for state judges
not for us. *Cf. Richardson v. Dudley*, 295 F. Supp. 181
184-85 (S. D. N. Y. 1969). Depending upon what the facts
reveal (for example about the practices of news dealers
in selecting items for sale), the state courts might conclude
that the presumption of knowledge applies only to speci
fied classes of those who deal in allegedly obscene things,
not to all who might be thought within the literal reach of
the naked statutory text. This seems, in short, to be a clear
occasion for abstention, and we follow that still open and
appropriate, if lately somewhat straitened, course.

V

The views expressed thus far imply an obvious prediction
that plaintiffs have only a faint hope of prevailing in any
aspect of their claims. We recognize, moreover, that
these cases are probable additions to those that wither and
die before trial unless plaintiffs prevail in their motions
for preliminary relief. These considerations do not lead
us, however, to the granting of defendants' motions to
dismiss. There remain broad, if unpromising, allegations
of bad faith. There are charges of threats and harassment
which, however empty they seem thus far, are not de
stroyed on the papers before us. And the alleged waves of
arrests, while they too remain largely unsupported, as of
now, are conceivably capable of more effective proof. Given

the liberality with which we must construe complaints as assailed by Rule 12 motions to dismiss, we conclude that the sound course is to deny the motions.

To summarize: plaintiffs' motions are in all respects decided upon the foregoing findings and conclusions pursuant to Fed. R. Civ. P. 52(a). The motions to dismiss are also denied. The purposes for which this three judge court was convened having been accomplished, the court is hereby dissolved.

It is so ordered.

Dated: New York, New York October 15, 1969

WILFRED FEINBERG,
United States Circuit Judge.

THOMAS F. MURPHY,
United States District Judge.

MARVIN E. FRANKEL,
United States District Judge.

DEC 27 1969
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 998

MILKY WAY PRODUCTIONS, INC., JAMES BUCKLEY and AL GOLDSTEIN,

Appellants,

against

HOWARD R. LEARY, individually and as Police Commissioner of the City of New York, and FRANK S. HOGAN, individually and as District Attorney of the County of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANTS MILKY WAY PRODUCTIONS INC., *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

MILKY WAY PRODUCTIONS, INC., JAMES BUCKLEY and AL GOLDSTEIN,

Appellants,

against

HOWARD R. LEARY, individually and as Police Commissioner of the City of New York, and FRANK S. HOGAN, individually and as District Attorney of the County of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANTS MILKY WAY PRODUCTIONS INC., *ET AL.*

Opinion Below

The opinion of the United States District Court for the Southern District of New York, three-judge district court, has not been reported and is set forth in Appendix A.

Grounds on Which Jurisdiction Is Invoked

(i) Appellants, Milky Way Productions, Inc., its executive editor, Al Goldstein, and co-publisher, James Buckley, (hereafter generally appellants or appellant Milky Way), instituted this action for declaratory judgment and for interlocutory and permanent injunction under 28 U.S.C. 2201, 42 U.S.C. 1983, 28 U.S.C. 1483, and 28 U.S.C. 2281 and 2284: (a) under Count II of the complaint to declare unconstitutional the New York Obscenity Statute, Penal Law 235.00(1), on the ground that it is an overbroad regulation of First Amendment rights failing to mandate pandering or foisting on an unwilling public and (b) under Counts I and IV of the complaint to declare unconstitutional facially and as applied as a matter of law to borderline publications the New York Arrest Warrant Statutes, Code of Criminal Procedure Sections 148 through 150.

(ii) Appellants seek a review of the ruling and order of the three-judge district court denying appellants' motion for an interlocutory injunction and holding constitutional facially and as applied as a matter of law Penal Law Section 235.00(1) and Code of Criminal Procedure Sections 148 through 150, decided and filed October 15, 1969. Notice of appeal was filed by appellant Milky Way on October 30, 1969, District Court, Southern District New York.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 United States Code Section 1253.

(iv) Cases believed to sustain jurisdiction: *Zwickler* v. *Koota*, 389 U. S. 241 (1967); *Cameron* v. *Johnson*, 390 U. S. 611, 615-617 (1968); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Goldstein* v. *Cox*, 389 U. S. 581 (1968); *Zschernig*

v. *Miller*, 389 U. S. 429 (1968); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960).

(v) The validity of Penal Law Section 235.00(1) and the validity of New York Code of Criminal Procedure Sections 148 through 150 facially and as applied as a matter of law are challenged. They are set forth in Appendix B.

Questions Presented

1. Is Penal Law Section 235.00(1) unconstitutional where it fails to mandate or confine its application as statutory tests to pandering and foisting on an unwilling public in either the hard-core or borderline (close case) area?

2. Where the procedural statutes (C.C.P. 148-150) as applied as a matter of law to borderline publications permit repeated arrests of publishers based only upon *ex parte* judicial ruling of the obscenity of a particular borderline publication issue, and permit the arrests of newsdealers for selling such issue without any warrant for their arrest, and (i) immediately upon the issuance of the warrant stop the public sales of the publication issue, which is the subject of the *ex parte* judicial ruling, and (ii) immediately stop and suppress the sale of subsequent publication issues, which are not the subject of any ruling of obscenity, *ex parte* or otherwise, and (iii) can totally destroy the publication itself, all while defenses are being asserted in the Criminal Court and appeals therefrom, and all before ultimate adversary determination of the obscenity of any publication issue.

Is the foregoing immaterial as a matter of law under the First Amendment, as appellees contend, because there is no physical "seizure," because in terrorem suppressions

are justified under *Smith* v. *California*, 361 U. S. 147, 154-155 (1959), and because defenses to a series of fully matured criminal prosecutions (lasting over three years) furnish alleged procedural safeguards?

Is all the foregoing immaterial where preliminary adversary determination in the borderline area will positively avoid suppressions and unconstitutional prior restraints and at the same time be an effective vehicle for obscenity law enforcement?

Statement of the Case

1. When and How Federal Questions Were Raised and Decided.

Appellant Milky Way instituted an action for declaratory judgment and appropriate injunctive relief. Appellees moved to dismiss the complaint and opposed the motion. The three-judge district court refused to grant injunctive relief where it held: I. appellants had fatally delayed seeking the "speedy adjudication" available in the state forum (Criminal Court) and had not shown bad faith prosecutions undertaken knowing their accusations could not be sustained; II. that while sufficiently substantial constitutional claims were made, nonetheless as a matter of law Penal Law Section 235.00(1) was constitutional; III. the arrest warrant statutes were constitutional as applied in law.

2. The Undisputed Facts and Rulings of Law.

On May 21, 1969, the printer, distributor and publishers were arrested for promoting[1] issues nos. 14 and 15 of ap-

[1] Promote is the statutory term Section 235.05(1); this of course has nothing to do with a promotional advertising campaign in the pandering sense.

pellant Milky Way's weekly newspaper entitled "Screw; The Sex Review" for alleged violation of New York Penal Law Section 235.05 (obscenity law). Although these publication issues were not obscene, appellant Milky Way desiring to comply with the law, not to evade it, almost immediately requested appellee District Attorney to advise appellant's counsel of the alleged obscenity (*Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 72 [1963]), or to institute preliminary adversary determination proceedings prior to the distribution of any issue. On June 17, 1969 these first cases were adjourned until September 15, 1969.

On June 26, 1969, following warrant issued on *ex parte* judicial ruling that issue no. 17 of the paper was obscene, once again the publishers and distributor were arrested for promoting issue no. 17. Several newsdealers were arrested for promoting issue no. 17 without any warrant for their arrest. Upon the issuance of the warrant for promoting issue no. 17 (i) it thereupon became contraband, its sale illegal and thereupon all sales stopped; (ii) in addition there was a massive drop in sales of the subsequent issues nos. 18 and 19, even though these subsequent issues were not the subject of any ruling of obscenity in any proceeding, civil, criminal, *ex parte* or otherwise.

As the complaint and moving papers allege, issue no. 17 and the publication issues which follow are not patently offensive, in whole or in part (indeed pictures which might be deemed highly offensive even if not obscene were removed), in addition have considerable social value, are newspapers containing no fiction, but which report and review books, music, rock and roll performances, motion pictures and plays which are published and performed locally and throughout the country, carry interviews with people and contain articles reporting the ethics and right and wrong concerning sexual attitudes in our society, and are not pandered (publishers placed two outside advertisements in four months and have never conducted a promotional advertising campaign). None of the publication

issues are obscene. However, we will assume, *arguendo only* for procedural purposes, that all subject publications are borderline.

Sometime about the middle of July all efforts to compromise the matter with appellee District Attorney by a notice negotiation system to pinpoint the alleged obscenity or by suspensions of arrests pending the outcome of the cases, or both, failed. At the same time the District Attorney made it plain that he would vigorously oppose any motion in the Criminal Court made returnable before September. On August 15th once again there were simultaneous arrests of appellant Milky Way publishers, their distributor, the publishers of three other weekly tabloids, together with innumerable newsdealers without warrants for the arrests of newsdealers. As the complaint alleges, the publication was driven off the streets. As the complaint further alleges, a repetition of still further arrests, both threatened by appellee District Attorney and inherent in the existence of the procedural statutes, would destroy the publication long before the matter could be settled in three years or more via the criminal courts and appeals therefrom.

On August 18, 1969 this lawsuit was instituted. Appellants *New York Feed Co., Inc., et al.*, publishers of "The New York Review of Sex & Politics," likewise arrested on June 26th and August 15th, instituted a separate action. The actions were consolidated; on September 17, 1969 appellants motion for a three-judge court was granted, a hearing before the statutory three-judge court was held on September 24, 1969, and its decision rendered October 15, 1969.

Appellant Milky Way claimed (complaint Count II) that Penal Law Section 235.00(1) was an overbroad regulation of First Amendment rights failing to mandate in either the hard-core or borderline case that pandering and foisting on an unwilling public are essential mandated material elements of the crime of obscenity, and therefore must be

set forth in the statute. Appellees claimed that the New York statute was patterned precisely after the Maryland opinions of this court, and that appellants had misread *Redrup* v. *New York*, 386 U. S. 767 (1967) and *Stanley* v. *Georgia*, 394 U. S. 557 (1969). The court below, noting several decisions to the contrary, agreed.

Appellant Milky Way claimed under complaint Count IV, incorporating Count I allegations, that the arrest warrant statutes (C.C.P. 148-150) are both an overbroad and unduly vague statutory scheme as applied as a matter of law to regulate borderline obscenity; overbroad because the statutes control within their sweep both the normal criminal contraband and borderline publications which are not contraband; unduly vague because probable cause to believe a borderline publication might be found obscene is meaningless. Appellants alleged that the threat of still further arrests, a fourth, fifth or sixth series of arrests on the basis of ex-parte judicial rulings would not only cause further suppressions, but would also destroy appellants' publication and totally suppress it in fact long before the issues of the obscenity could be determined, settled or pinpointed via the criminal courts and appeals therefrom, thus making it impossible for appellants to effectively contest the legal issues in the State courts.

Appellees moved to dismiss the complaint, thus for motion purposes admitting the factual allegations of the complaint. Appellees claimed it immaterial as a matter of constitutional law that (i) upon the issuance of the warrant the publication issue, which was the subject of the warrant, thereupon became contraband, its sale illegal and no one in fact would sell it, or (ii) that there was therewith a massive suppression of sales of subsequent publication issues which were not the subject of any ruling of obscenity, *ex parte* or otherwise, or that (iii) repeated arrests on the basis of *ex parte* judicial determination can destroy a borderline publication. Appellees say the foregoing is immaterial as a matter of law because technically there was no

"seizure," and hence constitutionally no prior restraint, and economic extinction is, to quote appellee Hogan (Hogan memorandum to dismiss complaints, p. 22, R #18*), "an inherent problem attendant in the dissemination of any publication bordering on obscenity," justified under *Smith* v. *California*, 361 U. S. 147, 154 (1959). Appellees claimed *ex parte* judicial review procedures for arrests are constitutionally authorized under *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *People* v. *Rothenberg*, 20 N. Y. 2d 35, 281 N.Y.S. 2d 316 (1967); *People* v. *White*, 56 Misc. 2d 900, 290 N.Y.S. 2d 253 (Crim. Ct. N. Y. Co. 1968); *People* v. *Kozak*, 56 Misc. 2d 337, 288 N.Y.S. 2d 692 (Crim. Ct. N. Y. Co. 1968); and that defenses to criminal court prosecutions and the right of appeals therefrom afford adequate procedural safeguards.

In short, according to appellees, arrest warrant statutes with *ex parte* judicial rulings of obscenity as applied as a matter of law (under the "history and operation" of the statute[2]) are constitutionally authorized so that all the facts alleged in the complaint, even if true, are immaterial as a matter of law. The court below, in Part III of its decision noting several decisions to the contrary, agreed.

A word is in order about the number of arrests and the lower court's holding (Part I of its decision) that appel-

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* R stands for Index to Record on Appeal.

[2] Appellant Milky Way's moving memorandum relied on *Zwickler* v. *Koota*, 389 U. S. 241 (1967); *Cameron* v. *Johnson*, 390 U. S. 611, 615-617 (1968). In addition, appellants' moving memorandum pointed out that an attack on a state statute as violative of constitutional rights as appllied as a matter of law includes a consideration of the manner of its application under the "history and operation of the statute" including a consideration of state decisional law. *Goldstein* v. *Cox*, 391 F. 2d 586 (2d Cir. 1968) following vacatur of decision *Goldstein* v. *Cox*, 389 U. S. 581 (1968) based on *Zschernig* v. *Miller*, 389 U. S. 429. *Goldstein*, *supra*, remanded to three-judge court to consider attack on statutes as applied under the history and operation of the statute.

lants had fatally delayed in pressing for supposed speedy adjudications available in state forums, and bad faith."

The court below (A 7a) said that it was able "to find not more than thirteen arrests for all affected issues of 'Screw.'" Factually, as set forth in Appendix C, this is wrong. What the lower court undoubtedly meant, relying on the Police Department affidavit (Lt. Ralph Russo of September 29, 1969, R# 22), was that a ~~more thirteen~~ newsdealers were arrested. However, that does not take into account in addition the eleven separate cases filed against the printer, publishers and distributors of "Screw" set forth in Appendix C with docket numbers.

But as a matter of law it is immaterial. For the threat is inherent in the application of the procedural statutes. If there can be thirteen arrests, there can be twenty-two or sixty-five. Furthermore, there need only be one more arrest to stop all newsdealers from selling any issues. And today, effective September 1, 1969, under Penal Law Section 235.05(5), wholesale promoting an obscene publication by a printer, publisher or distributor is a Class D felony (Penal Law 235.06) carrying with it a sentence of up to seven years. So, therefore, if there is a repetition of the August 15th arrests charging three publication issues obscene, the printer, publisher and distributor face twenty-one years in jail. Thus the statutes (C.C.P. 148-150) as applied in law afford the procedural safeguards of facing twenty-one years in jail to test First Amendment rights to publish borderline newspapers.

As far as delay is concerned, after the May cases were adjourned to September, before the June 26th arrests, appellant Milky Way's counsel attempted to work out a notice system (Goldstein affs. Aug. 26, 1969 pp. 9-10, R#3, Sept. 16, 1969 p. 9, R#10), or a system for preliminary adversary determination, agreed to by the District Attorney, Bronx County (Schwarz aff. Aug. 27, 1969, Ex. 3,

R#3), or a suspension of arrests pending state court determinations, suspensions agreed to on other occasions by appellees (see Milky Way memorandum in opposition to Hogan motion pp. 11-12, R#23). In short, a compromise in June or July was not beyond the realm of reasonable possibility. When, in mid July, that failed, appellee District Attorney specifically advised they would vigorously oppose any motions to dismiss returnable in late July or August because of vacation time, which as a practical matter would make it almost impossible to have motions heard, at the same time intimating, though not definitely promising, that matters would remain at rest until September. Nonetheless on August 15th there were further arrests.

Thus, as alleged, the refusal of appellee Hogan to compromise the matter, the institution of the last of three sets of arrests, coupled with the blunt threat after the August 15th arrests of still further arrests upon *ex parte* judicial rulings (appellants memorandum in support of motion p. 5, R#4; complaint para. 18, 25; R#1; Schwarz aff. Aug. 27, 1969 p. 1, R#3); and especially the existence of the statutes capable of being applied at any time to continue these arrests, all while the criminal court cases and appeals therefrom were pending, made it plain appellants would not survive to be able to contest the issues in the state courts.

The history of borderline obscenity law enforcement uniformly shows that fully litigated motions or fully litigated trials require months to be processed in the Criminal Court (e.g., *People* v. *Stabile*, 58 Misc. 2d 905, 296 N.Y.S. 2d 815 [Crim. Ct. N. Y. Co.]—motion made September 1968, decided January 24, 1969), and years to be processed via appeals. One look at the reported decisions confirms this. This is not anybody's fault, neither that of the District Attorney, the Criminal Courts nor defense counsel. It is inherent for there is no such thing for the most part as a simple novel borderline obscenity case. In addition, where clients are faced with jail sentences, counsel is duty

bound to raise all defenses lest they be waived, and conscientious Criminal Court Judges if they are to do the matter justice of necessity must take time.[3]

Appellants, therefore, tried to explain and alleged over and over that the supposed speedy State Court remedies were nonexistent in reality; that it would take two to three months for appellants' motions in the Criminal Court to be heard and decided; that Criminal Court motions could be decided without even reaching the constitutional issues here raised; that it was not unreasonable to suppose that appellants as defendants in the Criminal Court might obtain on motion a dismissal of some of the publication issues as non-obscene on the face of them, but might also lose on obscenity grounds and on both constitutional issues here raised; that thereafter there would be trials as to the obscenity of some or all publication issues, and appeals on all legal issues; and most important, appellees had made it abundantly clear they would continue arrests on *ex parte* judicial procedures during this entire period; that this would result not only in continued suppressions of borderline publications, but would force appellants out of business, so that appellants would never be able to test to its ultimate conclusion any legal issues via the state courts; hence the relevant time periods to determine whether state court remedies were adequate in practice, not theory, to test subject constitutional issues were years, not months.

Since the lower court nonetheless found fatal delay because of a supposed speedy remedy (A8a), appellants

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[3] In addition, in the New York County Criminal Court at motion part there are approximately five hundred to seven hundred fifty cases a week, at which part one or two judges must hear pleas, applications for adjournments, motions and simple preliminary hearings. Complex motions such as are involved in motion of defendants (appellants here) in the Criminal Court are sometimes referred to another judge, as happened. Preliminary hearings merely determine whether there is some factual basis for connecting the accused to the crime, which has nothing to do with constitutional law issues of borderline obscenity cases.

note the following. In September appellee District Attorney requested an adjournment to October 15th. Appellants' Criminal Court motions to dismiss were made October 17th, oral argument held December 15th-16th, the court fixed January 27th for decision date; total, two to three months for motions, just as appellants said. And the Criminal Court motions might be decided on any of several grounds raised but not here involved, or appellants might well lose on the two constitutional law issues here involved, etc. Hence the constitutionally relevant time periods for determining the adequacy of state court remedies in practice, not theory, to test subject constitutional legal issues are years, not months, just as appellants said.[4]

Hard-core material is a manageable, rather well defined class. *Ginzburg* v. *United States*, 383 U. S. 463, 499 n. 3 (Stewart, J., dissenting); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 457 (Harlan, J., dissenting); *People* v. *Stabile*, *supra*, 58 Misc. 2d at 909, 296 N.Y.S. 2d at 821; *People* v. *White*, *supra*. Assuming governmental power to ban hard-core (absent pandering and foisting), treating and permitting its public sales to be immediately stopped involves no overbreadth for hard-core is by definition and its nature obscene and hence contraband in the first place.

But that is not this case. A publication which is borderline is inherently, and by definition, a publication the ob-

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[4] *Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546 (SDNY 1969) furnishes a good example of rights theoretical in nature but nonexistent in reality where confronted with multiple prosecutions initiated upon *ex parte* judicial warrant. As hereafter noted in greater detail, of the twelve cases encompassed in the federal complaint all were ultimately dismissed in the Criminal Court, many on the grounds of nonobscenity. Nonetheless Rage and its president and owner were forced out of business, principally because of inability to function in face of repeated arrests, regardless of the ultimate outcome, its federal appeal abandoned, so that in reality neither Rage nor its individual operating president could effectively test even the question of preliminary adversary determination in the federal or state courts.

scenity of which cannot be determined until after trial and all appeals. Nonetheless the *ex parte* judicial ruling of its obscenity immediately makes it contraband and its sale illegal (upon appellees' own view of the law) and therewith immediately obstructs, and indeed totally stops the sale of a publication issue which is not yet obscene. That alone renders the procedural statutes unconstitutional. For the statutes as applied in law interferes with and stops the right of the public to receive a publication issue, on the assumption it is already obscene, and hence contraband, whereas a borderline publication is by definition and unlike hard-core not at that point obscene, *A Quantity of Books* v. *Kansas*, 378 U. S. 205, 212-213 (1964), and see Stewart, J., concurring opinion at 214.

In addition, that very *ex parte* judicial ruling of the obscenity of one publication issue in fact suppresses the sales of thousands of copies of subsequent issues of the publication which are not the subject of any ruling, *ex parte* or otherwise. And when that process is repeated enough times, the publication is destroyed, regardless of its non-obscenity. There cannot be any real experimentation on a state level with borderline publications as envisaged by Mr. Justice Harlan, *Roth* v. *United States*, 354 U. S. 476, 505-506 (1957) (Harlan, J., dissenting), or on a national level if small publishers can be crushed in the process before they can finish the experiment.

Bad faith means prosecution undertaken on the facts where evidentiary-wise on the facts the prosecution is undertaken with no hope of success. But where statutes, substantive or procedural, are overbroad, or unduly vague facially or as applied in law, suppresions of First Amendment rights will occur by prosecutions undertaken without bad faith, because the statutes are overbroad, or unduly vague. Furthermore, appellants are not seeking to enjoin criminal prosecutions *per se*, but only to enjoin in the future the enforcement, operation and execution (28 U.S.C.

2281) of the statutes to the limited extent that prosecutions for promoting borderline publications be commenced after preliminary adversary determination.

SUBSTANTIALITY OF FEDERAL QUESTIONS

I. Penal Law Section 235.00(1) is overbroad for failing to include pandering and foisting on an unwilling public.

The court below held appellant Milky Way had misread *Redrup* v. *New York*, 386 U. S. 767 (1967), and the cases that follow it. Most courts, however, have read *Redrup, supra*, and *Stanley* v. *Georgia*, 394 U. S. 557, 566-567, as appellant does, to wit, that in the hard-core case, and certainly in the borderline or close case area pandering and foisting on an unwilling public are essential mandated elements which must be present. *United States* v. *4,400 Copies of Magazines*, 276 F. Supp. 902 (D. Md. 1967) (5 judges sitting *en banc*); *United States* v. *127,295 Copies of Magazines*, 295 F. Supp. 1186, 1188-1189 (D. Md. 1968); *Grant* v. *United States*, 380 F. 2d 748 (9th Cir. 1967); *Poulos* v. *Rucker*, 288 F. Supp. 305, 307 (M. D. Ala. 1968); *Stein* v. *Batchelor*, 300 F. Supp. 602 (N. D. Texas 1969); the broader implications of *Stanley* are that obscenity is fully protected. *Karalexis* v. *Byrne*, —— F. Supp. —— (D. Mass. Nov. 28, 1969, CA 69-665-J) (three-judge court) declaratory judgment holding Massachusetts obscenity law unconstitutional as overbroad; exhibition of motion picture in a theatre available to the adult public was fully protected regardless of whether the picture was obscene, unless it might fall into the hands of children, or "it might intrude upon the sensibilities or privacy of the general public," i.e., was a public nuisance. *People* v. *Billingsley* (Mich. Ct. App. Oct. 30, 1969 #5544-46), obscenity convictions on paperbacks reversed; the "opinion of the court [this court in *Redrup*] repeated but declined

to rest decision solely on the Roth-Memoirs test; it adverted to the opinions of the justices who regard that test as too narrow a view of the First Amendment."

In a free society people have a right to be free from intrusions in their homes, or in buses, *Breard* v. *Alexandria*, 341 U. S. 622 (1951); *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952); or while traveling along highways, etc. However, "the line between transmission of ideas and mere entertainment is much too elusive [to be drawn] * * *, if indeed such a line can be drawn at all." *Stanley, supra*, 394 U. S. at 567, correctly refers to *Roth* as a case dealing with public distribution of material with dangers that it might fall into the hands of children, or here pertinent, citing *Redrup, supra*, 386 U. S. at 769, that it might intrude upon the sensibilities or privacy of the general public.

Balanced against this, however, is the right to publish knowing that the State may not interfere and the statutory definitions forbid it to do so, certainly in the borderline case, unless publisher is pandering and foisting on an unwilling public.

Appellees make no claim that the New York statute is susceptible of the construction contended for by appellants, and the New York Court of Appeals has given no indication that it would so construe it. See *People* v. *Carlos*, 24 N. Y. 2d 865 (1969). The statute is overbroad.

II. The procedural statutes (C.C.P. 148-150) are unconstitutional as applied in law to borderline publications.

There is a clear conflict in the federal decisions in the various circuits. Louisiana, *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662 (E. D. La. 1969) (3 judges); Illinois, *Cambist Films Inc.* v. *Illinois*, 292 F. Supp. 185

(N. D. Ill. Oct. 1968); and Georgia, *Sokolic* v. *Ryan*, 304 F. Supp. 213 (S. D. Ga. 1969); all held, as the court below noted, an arrest without adversary determination violated First Amendment rights. In addition, a three-judge court in Florida, *Morrison* v. *Wilson* (N. D. Fla. Sept. 26, 1969 PCA 2110), granted a preliminary injunction enjoining law enforcement officials from making any further arrests for sale of publications believed to be obscene "without there having been a prior adversary hearing on and a determination of the question of obscenity in accordance with the requirements as set out in Marcus v. Property Search Warrant, 367 U. S. 717 (1961), and A Quantity of Books v. Kansas, 378 U. S. 205 (1964) and of a three-judge District Court in Delta Book Distributors Inc. v. Cronvich, Case No. 68-1927."

But far more than just federal decisional conflict is at stake. At stake is the right of small publishers, newsstands and small retailers throughout the country to publish and sell where they want to comply with the law, but their publications can be totally suppressed by the application of arrest warrant statutes. This is especially without justification where, as hereafter noted (II-B, *infra*), alternative procedures, including preliminary adversary determination, are available which positively will avoid unconstitutional suppressions, will avoid the chill and at the same time will be an effective vehicle for enforcing obscenity law in the borderline area.

The validity of any procedural statute controlling First Amendment rights is to be viewed pragmatically. The "judicial angle of vision" must focus "on the operation and effect of the statute in substance." A prior restraint is not a talismanic test, the substance counts, not the form, *Kingsley Books Inc.* v. *Brown*, 354 U. S. 436, 441, 442 (1957).

A. The procedural arrest warrant statutes as applied as a matter of law operate in substance as an unconstitutional prior restraint and suppression of borderline publications under any view of the law.

1. Where Procedural Statutes Can Destroy a Borderline Publication Before Ultimate Adversary Determination of Obscenity, and the So-Called Procedural Safeguards of Defending Multiple Prosecutions Are No Safeguards at All on Appellees' Own View of the Law, the Statutes as Applied Are *Per Se* Unconstitutional.

"The teaching of our cases" is that only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression. *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965). Nor is it constitutionally material that subsequent to the institution of *ex parte* judicial review the publisher may have the right in a full hearing to contest the obscenity because this does not eliminate the danger of interference with the "unobstructed circulation" of the publications. *A Quantity of Books* v. *Kansas*, 379 U. S. 205, 212-213 (1964). See also, *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968), citing *Freedman*, *supra*, 380 U. S. at 58.

The institution of a criminal prosecution for promoting a borderline publication upon *ex parte* judicial ruling of its obscenity immediately obstructs and stops in fact the public circulation of a publication which by its very nature and definition, i.e., borderline, is not obscene and cannot be deemed obscene until after final adversary judicial determination. The arrest warrant statutes as applied in law are thus suppressing nonobscene publications and are therefore unconstitutional for this reason alone. (See Pt. II, A2, *infra*.)

And when the defense to a series of such prosecutions cannot possibly afford adequate procedural safeguards to

protect against the danger to abridgment of the right to unobstructed circulation of nonobscene books, on appellees' own view of the law, then the arrest warrant statutes as applied in law are unconstitutional beyond any shadow of a doubt.

How can it be otherwise? The appellees say that the suppressions which in fact occurred, the total destruction in fact of borderline publications which can result from the necessity of defending multiple criminal prosecutions is immaterial as a matter of constitutional law (i) under *Smith* v. *California*, 361 U. S. 147, 154; (ii) because there has been no "seizure"; (iii) because initiating criminal prosecutions upon *ex parte* judicial scrutiny is justified under federal New York case law. *Marcus* v. *Search Warrant, supra; People* v. *Rothenberg, supra; People* v. *White, supra;* see, also, *People* v. *Kozak, supra*[*] and (IV.) because defenses to criminal prosecutions further adequate safe guards.

But where the total destruction of the publication can flow from repeated arrests under the statutes based only on *ex parte* judicial ruling (as almost happened), and the existence of such statutes capable of being applied at any time can crush a borderline publication long before ultimate determinations after all appeals, the statutes operate in substance and pragmatically as an unconstitutional prior restraint, worse than any licensing or seizure statute ever drafted.

Smith v. *California, supra*, 361 U. S. at 154-155, relied upon by appellee Hogan and cited by the lower court, spoke of any criminal statute as "doubtless having *some* tendency

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[*] *People* v. *Richard Cohen*, No. B19991/1968, Crim. Ct. N. Y. Co. Sept. 17, 1968. Case dismissed on motion of District Attorney: "In borderline cases of obscenity we must have a prior [*ex parte*] judicial determination." This case, along with other cases cited, typifies the present New York law stemming from *People* v. *Rothenberg, supra*, to wit, that in borderline cases (just as the District Attorney said) *ex parte* judicial review is required, but no more than *ex parte* judicial review is required.

to self-censorship" and "*some* inhibitory effect" (emphasis supplied). However, appellee Hogan, it must be remembered, moved to dismiss and opposed appellants' motion on the ground that total destruction and "economic extinction" of a borderline publication "is not significant for federal purposes," is just "an injury * * * which always accompanies prosecution," and absent seizure, justified on *ex parte* judicial rulings as immaterial as a matter of constitutional law under *Smith* v. *California*.[6]

But economic extinction is far removed from some inhibitory effect. Appellants submit that *Smith* v. *California*, 361 U. S. at 154-155, has been twisted beyond anything therein contemplated. If procedural statutes can destroy a borderline publication by a series of arrests initiated on *ex parte* judicial scrutiny, before ultimate determinations of obscenity are made, such statutes have (i) increased the pressures toward self-censorship to a constitutionally unacceptable degree, to its zenith, total destruction; and (ii) defenses thereto cannot, on the face of it, guard against the danger of abridgment of the right of the public to unobstructed circulation of nonobscene publications. For on appellee Hogan's own statement, economic extinction, and hence total suppression of the publication in fact and total abridgment of the right of the public to possess the publication is, according to appellee Hogan, immaterial in law because in essence there is a criminal prosecution.

2. The Arrest Warrant Statutes (C.C.P. Sec. 848-850) as Applied as a Matter of Law Are Overbroad Statutes Controlling and Sweeping Within Their Reach Both the Usual Criminal Contraband and Borderline Publications Which Are Not Contraband.

Possibly obscene publications, and today even actually obscene publications, are not contraband, may not be equated with contraband, or controlled by statutes as if

[6] Hogan memorandum to dismiss complaints, pp. 2, 3, 22.

they were contraband. *A Quantity of Books* v. *Kansas*, *supra*, 378 U. S. 205, 211, 212 (1964); *Metzger* v. *Pearcy*, 393 F. 2d 202, 204 (7th Cir. 1968); *Stanley* v. *Georgia*, *supra*, 394 U. S. 557, 568 n. 11. The statutes (C.C.P. 148-150) on their face and as applied as a matter of New York law sweep within their reach and control and regulate the possession with intent to sell or sale of property which falls within two completely different categories: (i) the normal criminal contraband and (ii) borderline publications which may not be equated with contraband.

The foregoing is the operation of the statute as applied as a matter of law, under the history and operation of the case law, namely that upon *ex parte* judicial ruling that a publication is obscene, it thereupon becomes contraband, *People* v. *Rothenberg*, *supra*, relying on *Marcus* v. *Search Warrant*, *supra*; *People* v. *White*, *supra*; *People* v. *Kozak*, *supra*; thus rendering its sale illegal. Indeed, appellees defend their arrests of newsdealers without any warrant for the arrest of any newsdealer upon the legal theory that upon *ex parte* judicial ruling of obscenity of a particular publication issue, it thereupon became contraband and its sale illegal.

The entire purpose of procedural statutes (C.C.P. 148-150) is to control activities which are constitutionally subject to State regulation. "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broad," *Zwickler* v. *Koota*, 389 U. S. 241, 250 (1967).

Hard-core material is, as stated, a rather well defined manageable class. *Ginzburg* v. *United States*, 383 U. S. 463, 499 n. 3 (Stewart, J. dissenting); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 457 (Harlan, J. dissenting); *People* v. *Stabile*, *supra*, 58 Misc. 2d at 905, 909, 296 N.Y.S. 2d at 821; *People* v. *White*, *supra*. Treating hard-core material as contraband within the scope and reach of *ex parte*

arrest warrant statutes justifying immediate arrest and restraints pragmatically makes sense; such material is obscene, hence contraband in the first place. But by definition a borderline or close case publication is one where its obscene character cannot be determined until after final judicial determination.

Nonetheless the following is the rule of law according to the lower court. A statute authorizing a seizure on warrant following *ex parte* judicial ruling treating publications as contraband is an unconstitutional First Amendment suppression. A statute authorizing an arrest following *ex parte* judicial ruling which (i) immediately upon the issuance of the warrant stamps a borderline publication as obscene, and contraband, making its sale illegal, subjecting everyone who sells it to "immediate forthwith arrest" (see complaint para. 10-A, R#1), and thus in fact totally suppressing it and (ii) suppressing subsequent publication issues which are not the subject of any ruling, *ex parte* or otherwise, violates no First Amendment rights since there is no seizure. This exalts form over substance. Appellees' legal position is so completely wrong and has done such enormous damage to First Amendment rights it must be restated.

Appellee Hogan piously proclaims that *ex parte* judicial ruling of the obscenity of a publication issue effects no prior restraint because newsdealers and distributors are theoretically free to continue its sales (since it had not been seized), and hence the fact that no one will sell such publication issue is immaterial in law. (Appellee Hogan's Memorandum of Law to Dismiss Complaints, pages 12, 21, R#18). Appellees' legal position, accepted by the lower court, ignores all realities. The fact (which appellee Hogan deems immaterial in law) is that upon the *ex parte* judicial ruling of obscenity of a publication issue, newspaper, paperback, magazine or otherwise, no one will sell it. It is, therefore, suppressed, just as if it had been seized, or burned. There

is no difference between the arrest and seizure except one, the arrest on *ex parte* judicial ruling is a more deadly restraint for it suppresses not only the publication issue which is the subject of the warrant, but subsequent publication issues as well.

3. The Statute (C.C.P. 148-150) as Applied as a Matter of Law Permitting Arrests on "Probable Cause" to Believe a Borderline Publication Obscene Is Unduly Vague.

The term "probable cause" to believe a borderline publication issue obscene, thus supporting *ex parte* judicial ruling, is unduly vague, indeed meaningless. Such a statute used to control First Amendment rights is unconconstitutional, *Baggett* v. *Bullitt*, 377 U. S. 360, 367, 374 (1964).

There is hopeless substantive law confusion in the field of bordeline obscenity, including shifting and unresolved definitions of pandering. (Examples, *People* v. *Carlos*, 24 N. Y. 2d 865 [1969]; *cf. People* v. *Stabile, supra; People* v. *Weingarten*, 55 Misc. 2d 681, 286 N.Y.S. 2d 429 [App. Tm. 1st Dept. 1967[7]]; many more could be given.) Hence there is almost always some decision somewhere which will lead to pressures to "take action" or which may justify probable cause for believing a publication

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[7] Prosecution instituted March 13, 1966 under former Penal Law Section 1141. The lower court, 50 Misc. 2d 635, 271 N.Y.S. 2d 158 (Crim. Ct. N. Y. Co.) held the paperback not hard-core, but obscene under March 1966 tests of this court, including pandering on back cover. The Appellate Term affirmed. The Court of Appeals reversed October 1969 (N.Y.L.J. Nov. 3, 1969, p. 2, col. 2) but only on the grounds that the lower court holding of non hard-core was on the facts under former Penal Law Section 1141. Hence the present law of obscenity of the printed word is one of unbelievable confusion. Here germane, this must be tripled in spades because the test for the suppression is not obscenity but only probable cause to believe that some court might find the printed word might be obscene.

might be deemed obscene,[8] thus justifying the *ex parte* judicial ruling with all its attendant suppressive consequences.

The jeopardy then is not the jeopardy of the obscenity statute, but principally the jeopardy of the *ex parte* judicial ruling on probable cause. For above all the publisher must avoid arrests regardless of the ultimate outcome of the case. Counsel, therefore, is not asked to interpret the obscenity statutes, but to determine when probable cause may exist. But no lawyer of common or above common intelligence, experienced in the obscenity field, can do anything but guess at whether one of several dozens of judges (who understandably do not have obscenity law decisions at their fingertips) might find probable cause to believe a borderline publication issue might be obscene, thus triggering off jail, fingerprinting and all the suppressions which immediately follow.

4. Bad Faith Is Immaterial; the Arrest Warrant Statutes as Applied in Law Afford "Safeguards" Only to Major Corporations or Purveyors of Hard-Core Pornography, But Not to Small Publishers Who Wish to Comply With the Law.

Bad faith prosecution means a prosecution undertaken on facts where an evidentiary hearing would show that on the facts a prosecution was undertaken with no hope of success. *Cameron* v. *Johnson, supra,* 390 U. S. at 619; *Zwickler* v. *Koota, supra.*[9] But if a statute is overbroad, or

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[8] See footnote 7.

[9] The lower court comment (A-11a, n. 8) that *Zwickler* involved no pending State case does not distinguish *Zwickler* on any meaningful ground. *Zwickler* (389 U. S. at 253) wanted to continue distributing leaflets free from the threat of criminal prosecutions. Here the institution of the pending criminal cases underscores the reality of the threat of still further prosecutions. For it was, as alleged over and over, the third series of August 15th arrests coupled

(*footnote continued on following page*)

unduly vague, a prosecution could almost always be undertaken with some hope of success because it was overbroad, or unduly vague.

A G. P. Putnam's Sons, a Grove Press or Keystone Reader Service and their retail representatives can afford a possible 30-day misdemeanor jail sentence in one or two states and the large expenditures financing one or two test cases via the Criminal Court and appeals, while these publishers survive on other publication items in their line. No small publisher in the country can do that . . . He must publish, or the publication will die. The so-called procedural safeguards then of defenses to criminal actions are safeguards available firstly to major corporations who can survive on other items.

Defending criminal prosecution also affords safeguards for wholesale promoters of hard-core pornography who produce and sell in a clandestine secret manner. The presumptions of innocence of the facts help promotors of

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(*footnote continued from previous page*)

with the blunt statement of appellee Hogan's office that it would continue such arrests on *ex parte* judicial scrutiny and would not suspend such procedures while the Criminal Court cases and appeals were pending that left us no alternative but to proceed in the Federal Court. To appellants the institution and pendency of present criminal prosecutions, together with the threat to continue the prosecution under present procedures, emphasizes the reality and immediacy of the threat, and the concreteness of the dispute. According to the lower court comment, it would seem that the more removed the threat, the greater its mootness, the more applicable *Zwickler* would be. Appellant respectfully submits it to be the other way around. As for Cameron's instituting the action in three days, appellants were attempting to negotiate the matter, not without some possibility of success; the District Attorney of Bronx County had agreed to preliminary adversary determination. See Schwarz aff. Aug. 27, 1969, Ex. A, R#3. Appellants did not want still further litigation if the matter could be settled reasonably. Appellants came to the federal court when our backs were against the wall.

hard-core pornography, just as it aids anyone engaged in criminal conduct who wants to shield the facts. But for the small publisher or distributor who openly sells his borderline publications[10] this presumption and safeguard is of no consequence whatsoever.

For such publisher (or distributor) there is seldom if ever any fact question as to the name or identification of the publisher or date or the fact of the publication, for they have no interest in concealing these facts, to the contrary they must make these facts known to the public. What, then, are the presumptions and safeguards? A two-hour *ex parte* judicial scrutiny of a publication is followed by a warrant and information charging that the publisher (for example) on June 26th promoted issue No. 17 of Screw, facts which nobody would or could question. The presumption of innocence of the facts, therefore, is a meaningless safeguard. The next presumption is that upon issuance of the warrant the publication issue is obscene, and of course it is suppressed. The next safeguard afforded publisher is to come to court to prove the publication is not obscene. The criminal law presumption of innocence until proof of guilt beyond a reasonable doubt is of no significance on the constitutional law questions of obscenity.

So then *ex parte* judicial scrutiny casts upon the publisher, printer, distributor and newsdealer the burden of preparing a complex borderline obscenity case, with motions, expert witness, and constitutional law or mixed law fact questions on community standards, pandering, etc., with jail at stake.

Passing for the moment the unconstitutionality of the immediate suppression of the publication issues which are the subject of the warrant, and suppression of subsequent

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[10] As stated, the complaint alleges subject publications are not obscene; indeed, they are not borderline, but we have assumed they are borderline for evaluating the procedural questions.

publication issues, one or two such criminal cases and appeals are livable. But when this process can be repeated at any time, with repeated suppressions and destruction of the business and thus total suppression of the publication, while the publisher is trying to defend himself via the state courts, the so-called procedural safeguards are non-existent.[11]

The inherent unconstitutionality lies in the application of the procedural statutes with *ex parte* judicial rulings to borderline publications. Where publications are hard-core, and involve the kind of hard-core activity proscribed in any event, processing the cases as normal criminal cases is justified.

But by definition a borderline publication is one whose obscenity cannot be determined until after full adversary determination, but nonetheless is suppressed and treated as if obscene and contraband without even a preliminary adversary determination of its obscenity. For one who openly publishes a borderline publication, the fact presumptions available to a defendant in a criminal trial are of no consequence whatsoever. For a small publisher who

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[11] *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. at 69-70, did *not* purport to analyze this question in the concrete context of defending multiple prosecutions. *Rage Books Inc.* v. *Leary*, 301 F. Supp. 546 (SDNY 1969) is a good example of the so-called procedural safeguards of defending multiple prosecutions. Of the twelve criminal prosecutions encompassed in the federal complaint, four of them against the owner, every one of the twelve cases was dismissed in the Criminal Court, mostly on grounds of nonobscenity. Nonetheless, the owner could no longer face the prospect of repeated arrests nor could hire competent employees who were willing to do so, and principally on this account was forced out of business completely and went into an entirely unrelated business. Of course the appeal in the federal court was abandoned. Appellants present counsel represented plaintiff Rage and the owner, and hence has personal knowledge of the facts, and represents it to be so as an officer of this court.

cannot wage repeated contests, the safeguards are no safeguards at all.[12]

B. Suppressions of borderline publications stemming from the application in law of the arrest warrant statutes are totally without justification where alternative methods will avoid suppression, enable publisher to comply with the law and enable law enforcement officials to effectively enforce the law.

The unconstitutionality of the arrest warrant statutes as applied to borderline publications is totally unjustified where there are alternatives which will enable publishers to comply with the law and at the same time enable law enforcement officials to effectively enforce the obscenity laws. These alternatives as proposed by appellants (see Goldstein Aug. 26, 1969 aff. pp. 8-10, R. No. 3 and Goldstein Sept. 16, 1969 aff. p. 9, Ex. B, R. No. 10) include negotiation procedure (*Bantam Books* v. *Sullivan*, 372

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[12] Appellants also pointed out that the Criminal Court lacked injunctive relief power, and even a favorable determination by a Criminal Court Judge was not binding on other Criminal Court Judges. The lower court said that in the absence of demonstration that defendants would persist upon invalidated statutory premises, the lower court would not assume it. But this overlooks the fact that the People may feel compelled or obliged to test the question in more than one instance, as the People have done on other occasions or that an Appellate Term may reverse.

Appellants also point out in passing that a declaratory judgment in the state courts to determine whether publications are obscene is not available, *Rogerin Associates, Inc.* v. *Hogan*, No. 8790/1964, Sup. Ct. N. Y. Co. 1964. In this case, personally handled by appellants' counsel several years ago, and after *Bunis* v. *Conway*, 17 A. D. 2d 207, 234 N.Y.S. 2d 435 (4th Dept. 1962), the Supreme Court, New York County, held declaratory judgment was not available to test the obscenity issues, but that such question must be raised by defenses in the Criminal Court.

U. S. 58, 72; *Poulos* v. *Rucker*, 288 F. Supp. 305, 310 (M. D. Ala.); use of C.C.P. Section 22-a, and preliminary adversary determination which need not be a fully mature action at law, *Tyrone* v. *Wilkinson*, 410 F. 2d 639, 641 (4th Cir. 1969).

The court below opined that preliminary adversary determination, spelling "defeat" at an earlier stage, would not serve to avoid the "chill" or the "prior restraint." That conclusion is totally wrong on the undisputed facts. Let us assume, arguendo only, that upon preliminary adversary determination a court would have found probable cause for believing issue No. 17 of the publication obscene. Such determination would have stopped the sale of issue No. 17, for after the preliminary determination of its obscenity no one would promote it. But at the same time no one would have been arrested unless they promoted issue No. 17 after the preliminary adversary determination. Thus, the publishers could have definitively advised newsdealers that there was no adverse determination of the obscenity of issues Nos. 18 or 19, and therefore the legality of promoting them was not open to question. Hence preliminary adversary determination would have totally avoided any and all suppressions of issues Nos. 18 and 19.

Newsdealers and retail stores cannot possibly draw refined distinctions between publication issues. A newsdealer asks a basic question—Can I sell a publication issue without being arrested? With preliminary adversary determination a publisher can give a clear answer—Yes, there has been no adverse determination, you may sell it ergo no suppression and no chilling effect and no prior restraint.

Let's take the printer, the first of whom refused to print after the first arrest regardless of the obscenity. (See Buckley July 29, 1969 aff. p. 3 R. 3.) The printer could print free from the fear that for one mistake he faces the prospect of defending himself against a seven-year jail sentence. Just how temporary immunization from crimi-

nal prosecution by preliminary adversary determination can have a potential chilling effect on anyone (as the lower court said), escapes the understanding of appellants' counsel.

Furthermore, preliminary adversary determination as to the particular issue (in our example, No. 17) by permitting both parties to be before the court would, in the borderline area with its sometimes impossibly refined distinctions, force a pinpointing of objections and assure a rapid delineation of the guidelines without forcing publishers or distributors to repeatedly defend fully matured criminal actions at law. Furthermore, the assumption of a "defeat" at this stage is not justified. However, assuming, as the court below did, a "defeat" at this stage, a publisher would be no worse off. The publisher could still promote the publication and have a fully litigated criminal trial. The difference is that the publisher would have an opportunity to control and have a voice in the number of cases. It would permit of the envisioned experimentation flexibility on the state level, *Roth* v. *United States*, *supra*, 354 U. S. at 505, 506 (Harlan, J. dissenting), and on the national level.

To the best of appellants' counsel's knowledge, everyone, publishers, distributors, retailers and their attorneys uniformly recognize that preliminary adversary determination would not only work but would positively avoid the present chill. In any event appellants are confronted with the practical operating realities of the matter. Intending no disrespect, appellants submit that where appellants solicit preliminary adversary determination, appellants are in a better position to evaluate its impact than the lower court.

Rage Books Inc. v. *Learn*, *supra*, held preliminary adversary determination would hobble obscenity law enforcement. That, too, is completely unfounded. A California publisher of magazines and paperbacks, a New York pub-

lisher of a weekly newspaper, have print runs of 20,000 to 100,000 copies. A preliminary adversary determination need not be a fully matured action at law, *Tyrone, Inc.* v. *Wilkinson, supra,* 410 F. 2d at 641. A preliminary adversary determination of the obscenity of an issue would constitutionally authorize an arrest and seizure for thereafter promoting the publication issue. It would contitutionally immediately achieve law enforcement objectives of banning the obscene material. It would cause the publisher to lose, in most instances, the entire cost of the print run and all profits. Publishers obviously could not afford repeated preliminary adverse determinations of obscenity. Hence preliminary adversary determination would compel a publisher to be careful not to go overboard and would be a very effective method of enforcing the obscenity law. At the same time it would be a sensitive tool for pinpointing objections and avoiding the total suppressions which now occur.

Assuming constitutional power to ban hard-core pornography and to stamp as obscene even certain borderline publications, present statutory *ex parte* judicial scrutiny procedures penalize most those who are trying to comply with the law, and are trying to be reasonable in an era of sometimes total irrationality. It penalizes the most the small publisher or retailer, who unlike major corporations cannot test case one publication at a time. The ability to test First Amendment rights should not turn on the size of the corporation, and to paraphrase the statement, when the judiciary loses that fixed star of constitutional adjudication, we will all lose our way. There is no absolute freedom, and rights must be balanced. And so under the First Amendment there is no justification for repeated suppressions where there are available sensitive tools which will avoid suppression and at the same time enable law enforcement officials to effectively enforce the obscenity laws.

The issues are substantial and require plenary consideration by this court with briefs on the merits and oral arguments.

Respectfully submitted

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APPENDIX A

Decision of Court Below

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILKY WAY PRODUCTIONS, INC., *et al.*,

Plaintiffs,

—against—

HOWARD R. LEARY, *et al.*,

Defendants.

(69 Civ. 3638)

NEW YORK FEED CO., INC., *et al.*,

Plaintiffs,

—against—

HOWARD R. LEARY, *et al.*,

Defendants.

(69 Civ. 3808)

Appearances:

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Milky Way Productions, Inc., et al.

Appendix A

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Before:

FEINBERG, Circuit Judge, and
MURPHY and FRANKEL, District Judges

FRANKEL, D.J.

Appendix A

This three-judge court has been convened to consider applications for injunctive and other relief by plaintiffs in two consolidated cases who assert that their rights under the First Amendment, as it applies via the Fourteenth, are being infringed by state arrests and prosecutions on obscenity charges.

In one case plaintiffs are Milky Way Productions, Inc., and two of its officers, engaged in publishing a weekly tabloid called "Screw, The Sex Review." The other suit is brought by New York Feed Company, Inc., and Stephen Heller, who publish a bi-weekly tabloid entitled "The New York Review of Sex & Politics." Defendants in both cases are Howard R. Leary, Police Commissioner of New York City, and Frank S. Hogan, New York County District Attorney.

The publishers of "Screw," in their complaint filed August 18, 1969, charge that defendants, in May of 1969, "embarked upon a plan and series of acts the purpose and effect of which has been to suppress the public sale of several issues of subject tabloid newspaper and to deprive the public of its right to read the tabloid and now threatens to suspend completely the publication and dissemination of subject tabloid." Specifically, it is charged, plaintiffs Goldstein and Buckley were arrested in May and charged with violating New York Penal Law §235.05[1] by promoting Issues No. 14 and No. 15 of "Screw." Thereafter, the complaint continues, the plaintiffs were advised by their counsel that "the only real basis to justify the

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[1] "A person is guilty of obscenity when, knowing its content and character, he * * * [p]romotes, or possesses with intent to promote, any obscene material * * *." Effective September 1, 1969, the statute was amended in minor respects not pertinent here.

arrests" was found in certain pictures, and they "proceeded in subsequent Issues to eliminate those pictures which apparently were deemed or appeared to be most objectionable."

Nevertheless, it is alleged, Goldstein and Buckley were arrested again on June 26, 1969, again on charges under §235.05, because of their Issue No. 17. At the same time, "the distributor and several newsdealers" were arrested for promoting this issue. Moreover, plaintiffs charge, since May 21 "defendants, and particularly members of the Police Department, told, advised and threatened newsdealers and others that they would be arrested for selling any Issue of the publication Screw, including, of course, Issue No. 18 which was not subject to any process, civil or criminal."

As a result of these official actions, plaintiffs allege, sales of their Issues 18 and 19 have dropped from a former level of 75,000 to about 17,000. And this has happened, they say, even though "defendants * * * are or should be fully aware that Issues No. 17, 18, 19, 20 * * * did not and do not contain pictures falling within the definition of hard-core pornography, to wit: pictures showing a consummated sexual act."

The complaint goes on to allege "still further arrests" on August 15, 1969, for promoting Issues 22 through 24.

According to the complaint, defendants have been asked, but have refused, to employ alternative procedures, such as civil injunctions or informal advance consultations with plaintiffs, in lieu of criminal charges under the obscenity statute.

As a result of the acts alleged, plaintiffs say, their business is being destroyed and First Amendment freedoms

are being chilled. Allegedly lacking any other adequate remedy, they seek (in addition to damages) injunctive and declaratory relief of kinds, and on grounds more particularly stated below.

Plaintiffs in the second case, publishers of "The New York Review of Sex & Politics," plead a similar cause, with some variations. On June 20, 1969, they allege, plaintiff Heller, "among others," was charged with violating Penal Law §235.05 on the basis of the "Review's" Issue No. 9. In addition to Heller, Alvin Druss, principal of a distributing company, and "a number of newsstand dealers" (not named) are alleged to have been arrested. Circulation of the "Review" has dropped from 40,000 to 30,000. 193 newsstands carried it before June 20, but the number has since decreased to about 75. It is alleged that Heller was arrested again on August 15, 1969, this time for Issue No. 12 of the "Review." On this occasion, it is alleged, "some 70 or less [*sic*[2]] newsstand dealers, some of whom are blind, others who are handicapped and disabled," were also arrested. Unlike the complaint about "Screw," that concerning the "Review" makes much of the allegedly "tasteful" and otherwise valuable aspects of the publication, but this dubiety turns out to have little or no significance for purposes of the questions before us.

The alleged pattern of arrests, said to be pursued "recklessly and promiscuously," is assailed as an "effective prior restraint" forbidden by the Federal Constitution. Moreover, plaintiffs allege, with arrests being made before there has been an adversary ruling on obscenity, "defendants are acting in bad faith in that they are attempting to accomplish, and are in fact accomplishing, by extra

[2] The affidavits hereinafter discussed suggest that the word "less" pushes the approximation toward accuracy.

judicial means what could not be achieved if the legal processes were followed." As in the companion case, plaintiffs connected with the "Review" seek both damages and injunctive relief.

By motions returnable on September 16, 1969, both sets of plaintiffs have applied for relief *pendente lite*. While the motions are not identical, the sum total of the relief sought and the contentions raised by both may be outlined as follows:[a]

(1) Temporary injunctions are sought

(a) to forbid arrests unless there has first been an adversary hearing before a judicial officer to determine whether the publications in question are obscene;

(b) to require that defendants negotiate and "pinpoint" alleged qualities of obscenity before instituting criminal proceedings;

(c) to forbid threats of arrest or warnings by police officers to newsdealers that sale of the publications will or may lead to arrest.

(2) Declaratory rulings are requested invalidating N. Y. Penal Law §235 in several respects hereinafter detailed.

(3) Likewise, a declaration is sought that §§148-150 of New York's Code of Criminal Procedure are

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[a] Neither plaintiff joins in all the arguments or prayers of the other. The "Review" plaintiffs, for example, did not move initially for declaratory relief. The "Screw" plaintiffs have not joined in the attack upon the statutory presumptions, considered under "IV," *infra*. It simplifies things a little, however, and harms no one, to cumulate the several subjects in a single summary and treat them *seriatim* later on.

unconstitutional facially and as applied because they assertedly allow suppression of publications as "contraband" without a prior adversary hearing, contrary to the claimed protections of the First and Fourteenth Amendments.

(4) The convening of a three-judge court is urged—successfully, as this opinion indicates.

Defendants for their part have been permitted to cross-move for dismissal of the complaints, plaintiffs having waived the normal notice requirements.

In the papers filed for and against the motions, the broad outlines of the complaints are retraced, but with some notable modifications and additions. The alleged dates of arrests and the affected issues of the two publications are confirmed in the affidavits. The total of arrests appears to be sharply diminished; despite the bland assertion of undocumented numbers in plaintiffs' papers (with no detail and no ultimate weight even as affidavits go), we are able to find not more than 13 arrests for all affected issues of "Screw" and 5 for the affected issues of the "New York Review."

As against the complaint allegations that plaintiffs are being crushed by delayed vindication of their First Amendment rights, it has been shown without dispute that plaintiffs have acquiesced since May and June in the postponement of the pending state criminal proceedings. They have neglected during a summer and beyond to press for their right to speedy state adjudications or even to raise in the state courts the issues of constitutional law they want this court to decide.

Appendix A

Upon the foregoing facts, for reasons which follow, we have concluded that plaintiffs' motions must fail but that their complaints, if only narrowly, should survive defendants' motions to dismiss.

I.

Assuming in plaintiffs' favor a negative answer to the question whether 28 U.S.C. §2283[1] applies to cases like this one, cf. *Dombrowski v. Pfister*, 380 U. S. 479, 484 n.2 (1965); and see *gas Cinema, Inc. v. Vergari*, 298 F. Supp. 1175, 1178 (S. D. N. Y. 1969), appeal pending, no sufficient case is made for an injunction. To begin with, plaintiffs' claim founders because they cannot show the extraordinary need required to justify such rare interferences with state criminal processes. Their heavy burden is to demonstrate that this is one of the "exceptional cases" where this kind of relief is essential "to prevent irreparable injury which is clear and imminent . . . ." *Douglas v. City of Jeannette*, 319 U. S. 157, 163 (1943); and see cases collected in *Richardson v. Dudley*, 295 F. Supp. 181, 185 (S. D. N. Y. 1969) (three-judge court). The burden is not met by plaintiffs such as these who have had an available state forum for their claims over a period of three or four months, have been entitled to speedy adjudications in that forum, *Freedman v. Maryland*, 380 U. S. 51 (1965), and have chosen simply to bypass that avenue of relief in favor of seeking federal

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[1] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

intervention.[1] If such delay and disregard of state processes pending the arrival of self-inflicted "emergencies" could meet the test for a federal injunction, the abrasive device would promptly lose its "exceptional" character and would become a commonplace irritant.

Apart from the problem of fatal delay, plaintiffs' prayer for an injunction lacks the central element of *Dombrowski*, the basic case they invoke, namely, a substantial indication of "bad faith" in the pending state prosecutions. See *Cameron* v. *Johnson*, 390 U. S. 611, 619 (1968); *id.* at 623 (dissent); *Robinson* v. *Bradley*, 300 F. Supp. 665, 667 (D. Mass. 1969) (three-judge court). While there is a passing allegation of "bad faith" in the moving papers for "Screw" (Schwarz affidavit at 8), and the same phrase appears in the "Review" complaint (par. 34), the plaintiffs consistently deny that they must show "bad faith" prosecution. It is evident, moreover, that their use of the quoted words has a special and inapposite meaning—to describe the omission of adversary proceedings before arrest, which is a separate subject to be considered below.

In any event, the requisite bad faith has not been shown. In fact, beginning with the prosecutions of the "Screw" people in May, the papers and the oral submissions give a convincing picture of careful, discriminating prosecutions in *good faith*. Counsel have been enormously cir-

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[1] Plaintiffs do not show inadequacy of the state procedures in any material sense. Cf. *Palmore* v. *Dillon*, 386 F. 2d 74, 74 (2d Cir. 1967). They say that vindication of their attacks upon the state statutes in the pending criminal cases will not serve to terminate or prevent other prosecutions. In the absence of a demonstration that defendants would persist in proceeding upon invalidated statutory premises, we should not and will not assume it. This is sufficient answer even apart from our doubts that the state scheme of remedies is as barren as plaintiffs say it is.

cumspect on the subject, but the strong inference from what they do say is that the copies of "Screw" underlying the May charges closely approached the badlands of "hard-core pornography."[6] Similarly, there is nothing beyond bald assertion to indicate that defendants have brought charges or made arrests based on issues of the "Review" while knowing their accusations could not be sustained.[7]

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[6] Tying this to their argument that the prosecution ought to arrange a system of advisory opinions, plaintiffs in the *Milky Way* case tell us they realized there were pictures in the May issues which could lead a good-faith prosecutor to a determination of hard-core pornography. This was remedied, plaintiffs tell us. They proceed then to submit copies of the later, supposedly "purified" issues, which have also led to prosecutions, but none of the May numbers. The later items before us, whether "obscene" or not (which we are not asked to decide), contain noticeable amounts of naked people, flaunted genitalia, and suggestive postures, all in an environment of sophomoric smut that somebody may have thought to reflect liberated sophistication. Anatole France may not have deserved the stricture, but Mr. Justice Holmes would not even have wasted on this stuff the observation that this "sex talk has none of the charm of really felt lubricity." 1 *Holmes-Laski Letters* 414 (Howe ed., abr., Atheneum 1963). Since we have not been told in September what was in the admittedly lustier pages of May, we find no joy or utility in guessing. It is enough that the whole picture reflects nothing to suggest the "hopeless" prosecution solely for harassment which is the essence of *Dombrowski*-style bad faith.

[7] Further claims for injunctive relief have been noted and found frivolous, at least on the showing now before us. The alleged pattern or scheme of "threats" is not even adumbrated by the scattered (and disputed) instances reported by affiants who appear to have been soliciting the assertedly repressive remarks. The contention that prosecutors must consult, or negotiate before bringing obscenity charges, whether or not the idea might point toward a useful form of collaboration, is without basis in constitutional law.

Appendix A

This leaves the prayer for declaratory relief a distinct subject under cases like *Zwickler v. Koota*, 389 U. S. 241 (1967), and *Cameron v. Johnson*, 390 U. S. 611 (1968). The cited decisions indicate that declaratory relief may be available even if an injunction is not where unconstitutional claims of vagueness of overbreadth are lodged against a statute touching First Amendment freedoms. Even those decisions, however, leave largely intact the long-standing principle that "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank*, 333 U. S. 426, 431 (1948), quoted in *Public Affairs Press v. Rickover*, 369 U. S. 111, 112 (1962). There is no indication that cases such as a state proceeding affecting areas of First Amendment freedoms is an automatic candidate for duplicative and unnecessary conflicting decision or a concurrent federal suit for declaratory relief.*

In an effort to harmonize the general principles of discretion with the special forms of First Amendment protection implemented by *Zwickler* and *Cameron*, we conclude that the subjects of vagueness and overbreadth—available in any suit within the original reach of the federal injunction, *N. A. A. C. P. v. Button*, 371 U. S. 415, 432 (1963); *Thornhill v. Alabama*, 310 U. S. 88, 97-98 (1940); *Winters v. New York*, 333 U. S. 507, 515-516 (1948)—

* It should be mentioned that both *Zwickler* and *Cameron* will be distinguishable in those actions brought to enjoin state proceedings like the ones here. In *Zwickler* there was no pending state case at all but only a declaratory complaint in federal court on state grounds and leaving the problem open for the state courts. In *Cameron* the federal complaint was filed after the state proceedings had been concluded. Both *Zwickler* and *Cameron* were followed by denial of the federal suit. *Zwickler*, 389 U. S. at 244.

permissible for declaratory relief. Cf. *Robinson* v. *Bradley, supra*, 300 F. Supp. at 669. On this thesis, we will render a declaration on the subject covered under Point II, *infra* (facial unconstitutionality of Penal Law §235). For comparable reasons, we reach the claimed right to an adversary hearing before arrest (Point III, *infra*), but not the complex mix of fact and law involved in the contention that the presumptions in Penal Law §235.10 must be deemed "irrational" and therefore unconstitutional (Point IV).

II.

The substantive portions of Penal Law §235 are attacked on three grounds, all of which we hold to be mistaken.

(1) The main claim is that the definition of "obscene" in §235.00(1) is invalid on its face because it embodies only the three "tests" set out in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (1966), as derived from *Roth* v. *United States*, 354 U. S. 476 (1957), and intervening cases. Two more "tests," plaintiffs assert, were added by *Redrup* v. *New York*, 386 U. S. 767 (1967)—that there be "pandering" and "foisting upon an unwilling public."

Plaintiffs misread the *per curiam* opinion in *Redrup*. As shown by the fuller opinions from which they derive, the supposedly additional, and allegedly essential, "tests" are only *permissible* kinds of relevant *evidence* which may serve in a close case to tip the balance toward a finding of obscenity. The basic thought appears first in separate opinions of Chief Justice Warren. See *Roth*, 354 U. S. at 495 (concurring opinion); *Jacobellis* v. *Ohio*, 378 U. S. 184, 201 (1964) (dissent). It takes firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering the Court's

judgment in *Memoirs*, *supra*, where he said (383 U. S. at 420):

> "On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."

The idea reaches full bloom with Mr. Justice Brennan's majority opinion in *Ginzburg v. United States*, 383 U. S. 463, 470-473 (1966) (evidence of "pandering is relevant to the application of the *Roth* test" *id.* at 474).[6]

Nothing in *Redrup* changes the scope or effect of these added "tests." There is no support in that or any other decision of the Supreme Court for the view that they must be satisfied *in addition* to the three tests of *Memoirs* before a finding of obscenity is permissible. The standard

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[6] Mr. Justice Harlan, dissenting in *Ginzburg*, read the "majority views" on "the pandering test * * * as constitutional doctrine" rather than "a statutory gloss * * *." *Id.* at 494. His analysis does not help the plaintiffs here. The effect of the doctrine as he saw it (*id.*) was to provide an average toward a finding of obscenity which would otherwise not exist. He found it serving, in other words, to narrow, not broaden, the area of First Amendment protection. There is no basis for a position that state legislatures are required to incorporate such restrictive approaches in their statutes regulating obscenity.

as laid down in *Memoirs* was cited with approval as recently as *Stanley v. Georgia*, 394 U. S. 557, 568 (1969). For a view of the precedents similar to ours, see *United States v. 77 Cartons of Magazines*, 300 F. Supp. 851, 853-54 (N. D. Cal. 1969).

It bears mention, however, that plaintiffs are not alone in their contrary thinking. In *United States v. 4,400 Copies of Magazines, Etc.*, 276 F. Supp. 902 (D. Md. 1967), the five Judges of the District of Maryland, sitting *en banc*, unanimously ruled for the claimant in a condemnation case under section 305 of the Tariff Act of 1930, 19 U.S.C. §1305, on the explicit ground that *Redrup* has added cumulative, and therefore narrowing, "tests" of obscenity. While it found the magazines before it the lewdest it had ever considered, appealing more blatantly than any before to prurient interest, and devoid of social value, the Court held it impossible to sustain forfeitures for obscenity. Explaining what it saw as the decisive impact of *Redrup*, the Court said (at 904):

> "It appears * * * that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.
>
> "Since the magazines involved in the present case have not yet been admitted into the United States, we cannot be sure how they will be marketed—(a) whether they will be sold to juveniles, either by mail solicitation or over the counter, (b) whether they will be offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, and (c) whether they will be offered for sale in a manner which will amount to pandering.

> "This Court is, therefore, of the opinion that it cannot order the condemnation and forfeiture of these magazines at this time. On the other hand, this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in Ginzburg v. United States, 383 U. S. 463 at 465-466, 467, 470-471, 474-476, 86 S. Ct. 942, 16 L. Ed. 2d 31, they would not be entitled to the protection of the First Amendment. See Donnenberg v. State, 1 Md. App. 591, 232 A. 2d 264, 271 (1967)."

See, likewise, *United States v. 127, 295 Copies of Magazines, Etc.*, 295 F. Supp. 1186, 1188-89 (D. Md. 1968) (Thomsen, C.J., and Northrop, J.); and see *Grant v. United States*, 380 F. 2d 748 (9th Cir. 1967); *Poulos v. Rucker*, 288 F. Supp. 305, 307 (M. D. Ala. 1968) (interpreting *Redrup*, and the reversals without opinion in its wake, "as indicating that it is indeed a rare book that, solely on the basis of its content, is not entitled to constitutional protection").

Having attended respectfully to the apparent holdings in the Maryland District Court and the somewhat parallel observations elsewhere, we adhere to the position that the New York statute survives the opinion in *Redrup*.[10]

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[10] At the same time, we find enough in the way of utterly respectable disagreement to reject defendants' plea that this three-judge court be dissolved because no question of sufficient substance justified its convening.

(2) We can give shorter shrift to the argument that the New York State Legislature was bound to limit its proscriptions to "hard-core pornography" after the decision in *People* v. *Richmond News*, 9 N. Y. 2d 578, 216 N. Y. S. 2d 369 (1961), which so confined the statute then in effect. The Federal Constitution nowhere commands any such state judicial supremacy. The States are free, of course, by whatever organs they choose, to give wider freedom for expression than the First and Fourteenth Amendments require. See *Mishkin* v. *New York*, 383 U. S. 502, 507-508 (1966); Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms*, 4 Vand. L. Rev. 620, 642 (1951); cf. *Johnson* v. *New Jersey*, 384 U. S. 719, 733 (1966). They are not perpetually bound by experiments in that direction.

(3) The attack upon §235 as void for vagueness is frivolous. *Roth* v. *United States* sustained the bare word "obscene" against a similar assault. See 354 U. S. at 491-92. New York's detailed definition renders its statute more clearly impregnable.

III.

The argument that there must be an adversary hearing before an arrest for obscenity is made in two forms: (1) as an attack on N. Y. Code Crim. Proc. §§148-150, an asserted subject for three judges, and (2) as a simple claim of official lawlessness, cognizable by one judge. Version No. (1) invites us to an area that "abounds with slippery distinctions," Wright, *Federal Courts* 164 (1963) — namely, "between a petition for an injunction on the ground of the unconstitutionality of the statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a stat-

ute which is not attacked as unconstitutional. The latter petition does not require a three-judge court." *Ex parte Bransford*, 310 U. S. 354, 361 (1940). In the view we have taken, since there is three-judge jurisdiction on other grounds (see note 10, *supra*), we need not wade into this morass. See *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 80-81, 84 (1960), and cases there cited. Accordingly, we can and do go directly to the asserted requirement of a preliminary adversary hearing and decide the essentially identical question under either formulation—whether such a novelty is mandated by the First Amendment.

While what plaintiffs propose is indeed a relative "novelty," their argument is not without arguable connection to established principles. Plaintiffs rely upon the decisions which have condemned mass, or broadly effective, seizures of allegedly obscene writings without a prior adversary hearing. *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Bethview Amusement Corp.* v. *Cahn*, — F. 2d — (2d Cir. 1969); *Tyrone, Inc.* v. *Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Metzger* v. *Pearce*, 393 F. 2d 202 (7th Cir. 1968). A "prior restraint" is also effected, plaintiffs say, when arrests are made—particularly multiple arrests for promoting the same publication—because this inhibits others from continuing to distribute the materials. And so, the argument concludes, there must be an adversary hearing and judicial determination preceding the inception of the criminal process.

The argument is not merely plausible; it has won approval in several courts. *Delta Book Distributors* v. *Cronwick, Inc.*, — F. Supp. — (E. D. La. 1969) (three-judge court); *Cambist Films, Inc.* v. *State of Illinois*, 292

Appendix A

F. Supp. 185 (N. D. Ill. 1968); *Sokolic* v. *Ryan*, Civ. No. 2501 (S. D. Ga., 9/18/69).[11] But decisions we believe to be sounder, at least in the present state of learning, go the other way: *Turoff, Inc.* v. *Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Rage Books Inc.* v. *Leary*, 301 F. Supp. 546 (S. D. N. Y. 1969), appeal pending; *Astro Cinema Corp., Inc.* v. *Mackell*, 69 Civ. 778 (E. D. N. Y., 8/19/69); *The East Village Other, Inc.* v. *Koota*, 68 Civ. 125 (E. D. N. Y., 2/13/68). In the respect here pertinent, we join the latter group.

It is of interest in this connection, if by no means decisive, that plaintiffs' theory, if accepted, would have invalidated both federal and state convictions under obscenity statutes which have in the recent past been upheld by the Supreme Court. *Ginsberg* v. *New York*, 390 U. S. 629 (1968); *Mishkin* v. *New York*, 383 U. S. 502 (1966); *Ginzburg* v. *United States*, 383 U. S. 463 (1966). A point of greater importance, both as a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the "chill" or the "prior restraint" against which they contend. It does not appear that there were any arrests in the present cases before a judicial officer had scrutinized the materials and determined that warrants should issue. All that, like the proceedings of a grand jury, was accomplished *ex parte*—without either

[11] Each of the cited cases is distinguishable from ours in that each involved arrests coupled with seizures of allegedly obscene material. No seizures occurred in the cases before us. Nevertheless, as is highlighted by Judge Rubin's partial dissent addressed to this aspect of the *Delta Book Distributors* case, the court in each instance was persuaded to enjoin further criminal proceedings in addition to granting separable relief from the unlawful seizures.

the possible benefit to the accused or the potentially "chilling" effect upon others of adversary proceedings. The result, at least in terms of history, is to avoid any traditional form of "prior restraint" because the first overt impact upon the allegedly protected area comes at a time when all the protections and favorable presumptions of the criminal process are available to the defendant. Cf. *Near v. Minnesota*, 283 U. S. 697, 713-14 (1931).

This is not to blink at the undeniable fact that arrests and prosecutions are likely to deter activities of the kind against which they are directed. The very existence of criminal sanctions for forms of expression, especially when the standards of liability are such vexed questions at the highest judicial levels, must have some appreciable tendency of the same type. See *Smith v. California*, 361 U. S. 147, 154-55 (1959). The point remains that the inhibitions are not avoided by the new procedure plaintiffs want; they are, if anything, pushed back to an earlier time of open contest—when the burden of litigation and a species of readier "defeat" are likely to work their deterrent effects.

It is inappropriate, we think, to "weigh" (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the dispositive they urge are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible and very possibly preferred vehicles for enforcing laws against obscenity. See *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 489-90 (1962) (opinion of Harlan, J.); *id.* at 492-93 (Brennan, J., concurring); *Freedman v. Maryland*, 380 U. S. 51, 58 (1965); *id.* at 72-73 (Douglas, J., concurring); *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 690 (1968); *id.* at 709-10 (Harlan, J., concurring in part and dissenting in part); *Ginzburg v. United States*, 383 U. S. 463, 474-75 (1966); *Roth v. United States*, 354 U. S. 476, 492 (1957).

APPENDIX B

New York Penal Law Section 235.00(1):

"1. 'Obscene'. Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

Code of Criminal Procedure, Sections 148, 149, 150:

"CHAPTER II.—THE WARRANT OF ARREST

"§ 148. EXAMINATION OF THE PROSECUTOR AND HIS WITNESSES, UPON THE INFORMATION

When an information is laid before a magistrate, of the commission of an offense, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

As amended L. 1967, c. 681, § 31, eff. Sept. 1, 1967."

"§ 149. DEPOSITIONS, WHAT TO CONTAIN

The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

As amended L. 1967, c. 681, § 32, eff. Sept. 1, 1967."

"§ 150. IN WHAT CASE A SUMMONS OR WARRANT OF ARREST MAY BE ISSUED

1. If the magistrate be satisfied, from such depositions, that the offense complained of has been committed, and the offense charged is one of which a court of special sessions has exclusive jurisdiction and the person charged with the commission of the offense is a citizen of the state and a resident of the city or town where the information is laid, the magistrate may, in his discretion, instead of issuing a warrant as hereinafter provided, issue a summons which shall be substantially in the following term: '..... court, county of ..... city or town of .....

In the name of the people of the state of New York:
To .....

Complaint having been made this day by ..... that you (here briefly state the nature of offense in regard to which complaint is made), you are hereby summoned to appear before me (here insert title of magistrate issuing summons), at (location of court) on the ..... day of ..... 19 ..... at ..... o'clock .....M., to the end that an investigation may be made of said complaint; and upon your failure to appear at the time and place herein mentioned, you are liable to a fine of not exceeding twenty-five dollars. Dated at ..... the ..... day of .....

.....
(Here insert official title of magistrate).'

Appendix B

Upon said summons shall be indorsed the name of the complainant and of the person summoned and also a brief description of the offense complained of.

A record shall be kept of the issuance and disposition of each summons in the same manner as in proceedings under which a warrant is issued.

Such summons may be served by the complainant, or by a peace officer, or by any other person designated by the magistrate.

Upon the return of the summons the magistrate shall inquire and investigate into the subject-matter of the complaint in the same manner as if defendant were brought before the magistrate upon a warrant of arrest.

If the person summoned does not appear, such failure to appear shall constitute a contempt, which the magistrate is empowered to punish by a fine of not exceeding twenty-five dollars.

. Upon the return of the summons the magistrate shall inquire and investigate into the subject-matter of the complaint in the same manner as if defendant were brought before the magistrate upon a warrant of arrest. (sic)

If the person summoned does not appear, such failure to appear shall constitute a contempt, which the magistrate is empowered to punish by a fine of not exceeding twenty-five dollars. (sic)

2. If the magistrate be satisfied from such depositions that the offense complained of has been committed, and that there is reasonable ground to be-

lieve that the defendant has committed it, and if the case is one that does not come within the provisions of subdivision one of this section, he must issue a warrant of arrest. If a summons shall have been issued as heretofore provided, and the person summoned shall have failed to appear or shall have appeared and the magistrate determines that there is a reasonable ground therefor, a warrant of arrest may be issued.

As amended L. 1967, c. 681, § 33, eff. Sept. 1, 1967."

APPENDIX C

List of Arrests Affecting the Publication Screw

Affidavit of Lt. Ralph Russo, dated September 29, 1969 (R. #22), states that the District Attorney's Office search of the records revealed that "thirteen (13) newsstand operators were arrested and charged with selling issues of the tabloid Screw."

The complaint also alleges that the publishers, printers and distributors were arrested for promoting the newspaper Screw.

In addition to the arrests of thirteen newsstand operators, appellants set forth below the following cases lodged against publishers, printers and distributors of the publication Screw:

Case	*Docket Number*
People v. Jim Buckley	B13186/1969
People v. Al Goldstein	B13187/1969
People v. Joseph Maffia	B13188/1969
People v. Martin Balan	B13189/1969
People v. Jim Buckley	B16494/1969
People v. Al Goldstein	B16495/1969
People v. Archie Gordon	B16496/1969
People v. Jim Buckley	B20637/1969
People v. Al Goldstein	B20638/1969
People v. Jim Buckley	B21343/1969
People v. Al Goldstein	B21344/1969

Furthermore, Lt. Russo's number of arrests of newsstand operators covered only New York County. In addition to New York County, there were arrests for selling issues of the publication Screw in Kings County and Queens County, as follows:

Case	*Docket Number*
People v. Andrew Bartosh	B15086/1969 (Kings Co.)
People v. Sol Lieber	A4360 /1969 (Queens Co.)
People v. Sam Newman	A4361 /1969 (Queens Co.)
People v. Howard Ladinsky	A4362 /1969 (Queens Co.)

Total arrests for affected issues of "Screw" including newsstand operators and publishers, printers and distributors, twenty-eight (28).

SUPREME COURT, U. S.

Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 992

NEW YORK FEED COMPANY, INC., et ano.,
Appellants,

against

HOWARD R. LEARY, et ano.,
Appellees.

No. 998

MILKY WAY PRODUCTIONS, INC., et al.,
Appellants,

against

HOWARD R. LEARY, et ano.,
Appellees.

MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, IN HIS STATUTORY CAPACITY (28 U.S.C. § 2284)

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IN THE

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MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, IN HIS STATUTORY CAPACITY (28 U.S.C. § 2284)

In these consolidated cases, considered together by the Court below (a),* Louis J. Lefkowitz, Attorney General of New York, moves pursuant to Rule 16 of the Revised Rules of this Court, that the judgment of the United States District Court for the Southern District of New York be affirmed, or, in the alternative, that this appeal be dismissed.

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* Numbers in parentheses followed by the letter "a" refer to pages in the Jurisdictional Statement of appellants *Milky Way Productions, Inc.*, et al., unless otherwise indicated.

Opinions Below

The endorsement memorandum of the Hon. Marvin E. Frankel, District Judge, granting plaintiffs' motion to convene a three-judge District Court, is not reported. The opinion of the three-judge District Court for the Southern District of New York is reported at 305 F. Supp. 288. The opinion of the District Court is set forth in the jurisdictional statements of the appellants (1a-23a).

Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. Section 1253.

Statutes Involved

New York Penal Law Sections 235.00, 235.05, and 235.10; and New York Code of Criminal Procedure Sections 148-150 (24a-27a; *New York Feed* Juris, Stat. p. 3).

Questions Presented

1. Is an obscenity statute which sets forth practically verbatim the elements of obscenity prescribed by this Court in *Roth* v. *United States** and *Memoirs* v. *Massachusetts*** nevertheless void on its face for failure to set forth the additional factors of (a) pandering, or (b) foisting upon an unwilling public?

2. Are arrests in obscenity cases constitutionally forbidden unless the prospective defendant is afforded an

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* 354 U. S. 476 (1957).

** 383 U. S. 413 (1966).

adversary hearing on the question of obscenity prior to arrest?

3. Is the presumption of knowledge of the character and content of publications set forth in New York Penal Law Section 235.10 unconstitutional?

Statement of the Case

Appellants in both cases are the publishers of periodicals which deal extensively with sexual matters.*** Local authorities in New York County made a combined total of 18 arrests of publishers and newsstand dealers in connection with specific issues of both publications (7a). No arrests were made regarding any single issue until at least one arrest warrant had been issued by a Criminal Court Judge upon *ex parte* judicial scrutiny of that particular issue (18a). No seizures of any kind occurred. As the Court below found, the arrests were made, and prosecutions undertaken, in good faith (9a). ****

Upon these facts, appellants commenced separate actions (consolidated by the Court below) for injunctive and declaratory relief, claiming: that the arrests amounted to a "prior restraint" upon circulation of their publications, since New York's arrest warrant statutes (Code of Criminal Procedure Sections 148-150) failed to require an adversary hearing prior to arrest; that New York's obscenity statute (Penal Law Section 235.00) was "overbroad" for failure to set forth the factors of pandering or foisting upon an unwilling public as additional elements in the test

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*** *Milky Way* publishes "Screw, The Sex Review"; *New York Feed* publishes "The New York Review of Sex and Politics" (3a, 10a).

**** The complaints were not dismissed, however, thus permitting appellants to offer proof of bad faith, threats or harassment at a later stage of the actions (22a-23a).

of obscenity; and (in the case of *New York Feed* only) that the "presumption of knowledge" in New York Penal Law Section 235.10 was irrational, and negated the element of scienter, and was thus unconstitutional.

The three-judge District Court below denied injunctive relief, holding New York's arrest warrant and obscenity statutes constitutional, and declined to reach the question of the "presumption of knowledge" (in Penal Law Section § 235.10) absent an adequate submission of facts, and interpretation of the statute by the New York courts (1a-23a).

No Substantial Federal Question Is Presented Requiring Full Hearing Before This Court

I. New York's obscenity statute, which repeats almost verbatim the elements of this Court's definition of obscenity in *Roth* and *Memoirs*, is not unconstitutional for failure to set forth the additional factors of (a) pandering or (b) foisting upon an unwilling public.

In *Roth* v. *United States*, 354 U. S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), this Court established a definition of obscenity which was reiterated in *Redrup* v. *New York*, 386 U. S. 767, 770-771 (1967):

> "* * * (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value * * *."

New York's Penal Law Section 235.00 (which defines obscenity) consciously incorporates this Court's definition established in *Roth* and *Memoirs*. (See notes following McKinney's Consolidated Laws, Penal Law § 235.00).

Nevertheless, appellants claim that this Court's holding in *Redrup* required the addition of the factors of (a) pandering or (b) foisting upon an unwilling public as necessary elements of the definition of obscenity in order to sustain the constitutional validity of the statute.* The claim is based upon this Court's comment in *Redrup* that none of these additional factors was present. 386 U. S., at page 769. However, appellants overlook this Court's explicit holding in *Redrup* that (386 U. S., at p. 771):

> "Whichever of these constitutional views [including the *Roth* and *Memoirs* test] is brought to bear upon the case before us, it is clear that the judgments cannot stand." (Matter in brackets added.)

Thus, in the absence of any expression by this Court to the contrary, *Redrup* holds that the particular material there involved was not obscene as measured against the standard of the *Roth* and *Memoirs* test. No repudiation or change of the test can be discerned, even from the numerous summary reversals of obscenity convictions which followed in the wake of *Redrup*. See, e.g., 37 U.S.L.W. 3433-36; and, most recently, *Carlos* v. *New York* 38 U.S.L.W. 3205 (Dec. 8, 1969). The *Roth* and *Memoirs* test was cited with approval in *Stanley* v. *Georgia*, 394 U. S. 557, 568 (1969), which held that mere private possession of pornography (absent an intent or attempt to sell) could not be proscribed by State action.* Several courts have agreed with appellants' reading of *Redrup*, e.g., *United States* v. *4,400 Copies of Magazines*, 276 F. Supp. 902 (D. Md. 1967, *en banc*); *Grant* v. *United States*, 380 F. 2d

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* The question of sale or distribution to minors is not relevant here, since New York treats that problem separately in Penal Law § 235.20(6), held constitutional in *Ginsberg* v. *New York*, 390 U. S. 629 (1968).

* New York's Penal Law Article 235 contains no such regulation or proscription. Only the "promotion" of obscenity (i.e., sale or possession with intent to sell) is dealt with. Penal Law § 235.05.

748 (9th Cir. 1967); *Poulos* v. *Rucker*, 288 F. Supp. 305 (M. D. Ala. 1968), while others have disagreed, e.g., *United States* v. *77 Cartons of Magazines*, 300 F. Supp. 851 (N. D. Cal. 1969).

The logical implications of the additional factors urged by appellants (pandering and foisting) would tend to broaden the scope of permissible State action, rather than to limit it. For example, evidence of "pandering is relevant to the *application* of the *Roth* test", *Ginzburg* v. *United States*, 383 U. S. 463, 471 (emphasis added), and can serve to negate any minimal redeeming social value which might otherwise save a publication. *Memoirs* v. *Massachusetts*, *supra*, 383 U. S., at page 420. Similarly, "foisting upon an unwilling public" introduces the concept of nuisance, but otherwise constitutionally protected speech may be proscribed as a nuisance if uttered, for example, through an amplifier in a residential neighborhood late at night.

If the States have any constitutionally permissible interest in regulating obscenity, neither pandering nor foisting should logically be considered as decisive factors—i.e., additional necessary elements in the test of obscenity—since both go primarily to the ancillary conduct of the vendor, and not necessarily to the substance (or degree of obscenity) of the material itself. "Hard core" pornography is no less "hard core" if it is not pandered. Evidence of pandering tends to negate "redeeming social value" in close cases, but if the absence of pandering is held to confer immunity, then any material—no matter how "hard core"—may be sold, provided its advertising is sufficiently circumspect, or its cover plainly wrapped in brown. Conversely, one who sells Louisa May Alcott's "Little Women" might be required to re-examine his promotional enthusiasm. The practical result would not be simply to add an element to the three prescribed in Roth; it would be to scrap the *Roth* test entirely, and substitute

a one-element test—pandering. In strict logic, if the ancillary conduct of the vendor is to be entirely controlling, as appellants urge, then it should be considered only in the context of nuisance, i.e., "foisting upon an *unwilling* public". If there be no such nuisance, it is hard to see how pandering *per se* which is willingly received can be any more "hard core" (or any more proscribable) than the material itself. The same practical result would be reached if "foisting" were to be considered decisive, for material may be sufficiently offensive to warrant state action even though it may not be considered obscene under the *Roth* test.

The additional factors urged by appellants, while probably controlling in close cases (pandering) or valid in dealing with separate areas for regulation (foisting), do not constitute additional necessary elements in the constitutional test of obscenity, and a statute such as New York's Penal Law § 235.00 is not subject to challenge for failure to include them.

II. A prior adversary hearing is not a necessary constitutional prerequisite to arrests in obscenity cases.

In the context of an attack on New York's arrest warrant statutes (Code of Criminal Procedure §§ 148-150) appellants urge that arrests may not be made in obscenity cases without a prior adversary hearing, at which the prospective defendant may dispute the issue of obscenity. Otherwise, they say, an arrest constitutes a "prior restraint", or at least creates a "chilling effect" on First Amendment rights. No case decided by this Court supports any such proposition.

Appellants build upon *Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); and *Bethview Amusement Corp.* v. *Cahn*, 416 F. 2d 410 (2d Cir. 1969), all of which involved seizures which were held to be broad, or broadly effective. But no

seizures of any kind were made in this case. Nor does this record reveal a pattern of "mass arrests", amounting to suppression, appellants' assertions to the contrary notwithstanding (9a, 18a). No arrests were made for any specific material without prior judicial scrutiny of the material involved, and the issuance of a warrant (18a). As the Court below held, the arrests in this case were made in good faith, and in a careful and discriminating manner, thus rendering *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965) inapposite (9a-10a). At issue here, then, is the abstract question of whether any arrests at all were constitutionally permissible without a prior adversary hearing. Questions concerning the *bona fides* of the arrests, or alleged calculated patterns of suppression, are not in this record (22a-23a).

A recent line of cases, e.g., *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662 (E. D. La. 1969); *Cambist Films, Inc.* v. *State of Illinois*, 292 F. Supp. 185 (N. D. Ill. 1968); *Sokolic* v. *Ryan*, 304 F. Supp. 213 (S. D. Ga. 1969), have held that adversary hearings prior to arrest are required, but all of these cases involved seizures. Another line of cases is in accord with the Court below, e.g., *Tyrone, Inc.* v. *Wilkinson*, 410 F. 2d 639 (4th Cir. 1969), cert. den. sub nom, *Wilkinson* v. *Tyrone, Inc.* (12/15/69, Nos. 409 and 418);* *Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546. (S.D.N.Y. 1969); *Astro Cinema Corp., Inc.* v. *Mackell*, 69 Civ. 778 (E.D.N.Y. 8/19/69); *Overstock Books, Inc.* v. *Aspland*, 69 Civ. 516 (E.D.N.Y. 10/31/69); *The East Village Other, Inc.* v. *Koota*, 68 Civ. 125

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* The lower courts had granted relief concerning the seizure, but had declined to enjoin prosecutions. Local authorities petitioned for certiorari to review the rulings concerning the seizure (No. 409), and *Tyrone* petitioned for certiorari to review the denial of injunctive relief against the prosecutions (No. 418). Both applications were denied by this Court on December 15, 1969. 38 U.S.L.W. 3218.

(E.D.N.Y. 2/13/68). Indeed, convictions for obscenity in which the normal arrest procedures were utilized were upheld in *Ginsberg* v. *New York, supra,* 390 U. S. 629 (1968); *Mishkin* v. *New York,* 383 U. S. 502 (1966); and *Ginzburg* v. *United States, supra,* 383 U. S. 463 (1966). In none of these cases in this Court, however, was the point expressly passed upon.

If obscenity may constitutionally be regulated by the States at all, action must necessarily be taken at some point which will apprise the prospective defendant that the publication involved has become the subject of an accusation of obscenity. Any such action, no matter how tentative or preliminary, will tend to have at least the potentiality of some inhibitory effect. As this Court said in *Smith* v. *California,* 361 U. S. 147, at pp. 154-155:

> "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene * * *."

This is true no matter what form the initial action may take . . . whether it be the denial of an application for an import license, or notice of the commencement of an injunction action (cf. N. Y. Code of Criminal Procedure § 22-a), or the commencement of criminal proceedings (as in this case), or a notice to appear for an adversary hearing prior to the commencement of criminal proceedings (as *Milky Way* suggests, Juris. Stmt. pp. 27-30). Indeed, the State need not act at all; a "chilling effect" may possibly result from the mere existence of a statute. See *Zwickler* v. *Koota,* 389 U. S. 241, 252, 254 (1967), but that merely leads to scrutiny of the statute on its constitutional merits.

The question posed by appellants, as to whether the State acts unconstitutionally in obscenity cases when its first step is the traditional one, the arrest, plainly leads to a negative answer. The arrest is no more inhibitory

of First Amendment rights than any other form of State action which has as its ultimate objective the regulation of obscenity.* Indeed, since the defendant is surrounded at that point with many constitutional safeguards otherwise unavailable, the arrest may be preferable to other forms of procedure. See *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 69-70 (1963); *Freedman* v. *Maryland*, 380 U. S. 51, 58-59 (1965); *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441-43 (1957); *Near* v. *Minnesota*, 283 U. S. 697, 713-15 (1931).

Clearly, Milky Way's suggestion (Juris. Stmt. pp. 27-30) of proceedings prior to arrest does not afford a preferable alternative to the arrest as a first step. In *Delta Book Distributors* v. *Cronvich supra*, 304 F. Supp. at p. 667, the Court recognized that procedures prior to arrest may themselves constitute a form of prior restraint, citing the expense of legal representation, and apprehension whether the material in question should continue to be sold pending the outcome of the hearing.

In summary, then, it seems clear that if the States have constitutional power to regulate obscenity, use of the arrest as the traditional first step in such regulation does not offend the Constitution.

III. The presumption of knowledge of the character and contents of publications, contained in Penal Law § 235.10, is not unconstitutional.

Appellant New York Feed Company (alone) contends that N. Y. Penal Law § 235.10 contains an unconstitutional presumption of knowledge, on the part of the seller, of the character and content of the publications which he sells or offers to sell (*N. Y. Feed Co.* Juris. Stmt. pp. 20-21). The Court below declined to pass upon the question,

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* Bearing in mind that no *Dombrowski*-style bad faith is present in this record, as shown above.

citing the lack of sufficient facts in the record, and the open question of construction by the New York courts (20a-22a).

The only response of appellant in this regard is to "common sense." This is in no way any tenable challenge to the position of the District Court. We submit that the disposition is unassailable.

Apart from that, it is apparent that the challenge is untenable.

New York Feed seems to claim that the presumption negatives the element of *scienter* in the crime of obscenity, and that the presumption is irrational.

So far as *scienter* is concerned, New York renders it a necessary element both by statute and by probable (if not certain) State court construction. Penal Law § 235.10, which sets forth the presumption, must be read together with Penal Law § 235.05 (*N. Y. Feed* Juris. Stmt. p. 3), which prescribes knowledge of the content and character of the publication as a necessary element of any conviction for obscenity. *Smith* v. *California, supra,* 361 U. S. 147, decided prior to the enactment of § 235.05, held such an element to be a constitutional necessity. Thereafter, in construing former Penal Law § 1141 (predecessor of Article 235) the New York courts recognized *scienter* as a necessary element, *People* v. *Finkelstein,* 9 N. Y. 2d 342 (1963), and would doubtless so recognize it today, even if it were not enshrined in the statute.

With respect to the rationality of the presumption of knowledge, *New York Feed's* reliance on *Leary* v. *United States,* 395 U. S. 6 (1969) is misplaced. That case reiterated the long-standing rule that a presumption must have a rational relationship to reality. There, the presumption was that the defendant not only knew that he possessed marijuana, but knew that it was *imported.* This presumption was held to fall in face of the well-known

fact that marijuana can be grown in the United States.* This is quite different from a presumption that a seller of pornographic materials knows what he is selling. The presumption in any event has been held rebuttable, for example by a luncheonette owner who works long hours and lacks sufficient time to read his wares. *People* v. *Engel*, 7 N. Y. 2d 1002 (1960).

CONCLUSION

For the foregoing reasons, the within motion to dismiss or affirm should be granted.

Dated: New York, N. Y., February 3, 1970.

Respectfully submitted,

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* On January 20, 1970, this Court held valid a presumption of knowledge that heroin is imported. *Turner* v. *United States*, —— U. S. ——, 38 U.S.L.W. 4103.

(39681) SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 992

NEW YORK FEED COMPANY, INC., et ano.,

Appellants,

—against—

HOWARD R. LEARY, et ano.,

Appellees.

No. 998

MILKY WAY PRODUCTIONS, INC., et al.,

Appellants,

—against—

HOWARD R. LEARY, et ano.,

Appellees.

MOTION TO AFFIRM

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MOTION TO AFFIRM

In these consolidated cases, considered together by the court below, the appellee Leary moves to affirm both cases pursuant to Rule 16 of the Rules of this Court on the ground that the questions presented are so insubstantial as not to need further argument.

Statement of the Case

The relevant facts in both cases are adequately stated in the opinion of the court below (3a *et seq.*)*

ARGUMENT

The questions raised by appellants lack substantiality.

a. The New York obscenity statute involved is constitutional.

The New York statute rests on a definition of obscenity which conforms with the decision of this Court. It is based primarily on *Roth* v. *United States*, 354 U. S. 476 (1957), as elaborated on in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). In the latter case this Court said (p. 418):

> "We defined obscenity in *Roth* in the following terms:
>
> '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U. S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relat-

* References followed by the letter "a" are to pages of the Appendix to the jurisdictional statement in the *Milky Way Productions* case.

> ing to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

New York Penal Law, Section 235.00, defines "obscene" as follows:

> "1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

This is still the proper constitutional test of obscenity. *Stanley* v. *Georgia*, 394 U. S. 557, 568 (1969) ("*Roth* and the cases following that decision are not impaired by today's holding"); *Miskin* v. *New York*, 383 U. S. 502, 507 (1966) ("The First Amendment prohibits criminal prosecution for the publication and dissemination of allegedly obscene books that do not satisfy the *Roth* definition of obscenity"). See, also, *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964).

Where, however, all three elements of the *Roth* test are *not* present as, for example, where the publication has a:

> "minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evi-

> dence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance." *Memoirs, supra,* 383 U. S. at p. 420.

The application of this "pandering" concept was further explained in *Ginzberg* v. *United States,* 383 U. S. 463, 474 (1966): "* * * in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." The Court explained that "such evidence may support the determination that the material is obscene *even though in other contexts the material would escape such condemnation.*" (*id.* at p. 476, emphasis supplied.)

Appellants argue, however, that this Court mandated two additional tests in *Redrup* v. *New York,* 386 U. S. 767 (1967), and that the absence of these additional requirements in New York's Penal Law makes it constitutionally defective. Appellants have misread *Redrup.* That case noted the different views of the Justices and held that the publications therein were not obscene "[w]hichever of these constitutional views is brought to bear upon the cases before us" (*id.* at p. 771). None of the constitutional views expressed in *Redrup* dealt with additional requirements for a finding of obscenity. The Court in *Redrup* noted, however, the absence therein of any evidence of pandering, foisting on an unwilling public, or sale to minors.

Appellants find support for their misconceived conclusion that *Redrup* restricts obscenity to only those publications which pander, are sold to minors or are foisted upon an unwilling public in a partial, out of context quo-

tation from the *Stanley* case. This Court, in discussing the *Roth* holding, stated that it was not necessary to prove that "exposure to obscene material would create a clear and present danger of antisocial conduct" (394 U. S. at p. 567). It went on to point out that *Roth* involved public distribution and that public distribution is always subject to the "danger that obscene material might fall into the hands of children * * * or that it might intrude upon the sensibilites or privacy of the general public" (*Ibid.*).

The District Court properly rejected appellants' argument and issued a declaratory ruling that New York's statutory definition of obscenity is constitutionally sufficient.

b. An adversary hearing is not required prior to the issuance of arrest warrants for violation of the obscenity law here involved.

Although it has been held that an adversary hearing must be held before allegedly obscene material is seized, this Court has not held that such a hearing must be had before an arrest can be made for violation of an obscenity statute. And all of the lower court cases relied on by appellants appear to have involved situations in which there were seizures.

It is undoubtedly true that arrests may have some "chilling effect" on the exercise of First Amendment rights. But the existence of a statute making distribution of obscene material a crime also has such an effect. A prior adversary hearing is not required merely because the existence of a statute or the making of arrests under the statute may make people hesitate before distributing material that might be regarded as violative of the statute.

A similar "chilling effect" argument was advanced and rejected in *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D.C. Cir.,1967), affd. 390 U. S. 457 (1968).

Nor is there any valid basis for appellants' assertion that there were mass arrests. On two separate dates, June 26, 1969, and August 15, 1969, there were a total of only thirteen arrests of newsdealers in New York City, as noted in the opinion of the court below.

c. The presumption of knowledge of the content and character of obscene material by a person promoting such material has not been shown to be unconstitutional.

In the *New York Feed Company* case it is argued that the presumption in N. Y. Penal Law, Section 235.10 is unconstitutional (Juris. Statement, p. 20). In support of this contention it relies on *Leary* v. *United States*, 395 U. S. 6 (1969). That case and the cases discussed in it merely hold that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend" (p. 36). Here the appellant has not shown that the presumed fact is *not* more likely than not to flow from the proved fact. Nor can it be said that the presumption is so obviously irrational on its face that it must be stricken.

Moreover, the presumption is being attacked in an action brought by the publishers of the allegedly obscene material. It seems obvious that the presumption is rational with respect to the publishers.

CONCLUSION

The motion to affirm should be granted.

February 12, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969

No. 992

NEW YORK FEED CO., INC., and STEPHEN HELLER,
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against

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Appellees.

No. 998

MILKY WAY PRODUCTIONS, INC.,
JAMES BUCKLEY and AL GOLDSTEIN,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1969

No. 992

NEW YORK FEED CO., INC., and STEPHEN HELLER,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

No. 998

MILKY WAY PRODUCTIONS, INC., JAMES BUCKLEY and AL GOLDSTEIN,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the appellee Hogan herewith moves to dismiss the appeals in the above entitled actions on the ground that they are not taken in conformity with 28 U.S.C.

Section 1253 and on the ground they do not present a substantial federal question; or, in the alternative, to affirm the judgment below as fully in accord with all controlling constitutional principles.

Preliminary Statement and Jurisdiction

The respective appellants appeal directly to this Court, pursuant to 28 U.S.C. Section 1253, from a decision of a three judge district court, rendered on October 15, 1969, denying motions for temporary injunctive and other preliminary relief.

Questions Presented

1. Whether, in the exercise of sound discretion, a federal district court should assume jurisdiction in a case seeking to enjoin prosecution for violation of a valid State statute?

2. Whether a substantial constitutional question under the First Amendment is presented by the definition of obscenity contained in Section 235.00 of the Penal Law, which, though incorporating relevant federal standards, does not require that a publication be pandered, foisted upon an unwilling public or sold to a minor?

3. Whether the rationality of the presumption of scienter contained in Section 235.10 of the Penal Law can be challenged though no facts on this issue were adduced in the lower court and though no showing has been made that the presumption will be applied in the upcoming prosecution?

4. Whether the *ex parte* arrest warrant procedure employed by the appellees in the present case necessarily raises an issue of constitutionality of Sections 148, 149 and 150 of the New York Code of Criminal Procedure which deal with the quantum of evidence necessary to issue a warrant for arrest?

5. Whether the First Amendment requires that an adversary proceeding be conducted prior to arresting a person for selling an obscene publication, no seizure of the publication occurring?

6. Whether appellants have standing to challenge the arrests of dealers for selling appellants' tabloids?

Statement of the Case

The Criminal Charges

The instant appeals involve two separate actions brought by separate and distinct parties against the identical defendants, appellees herein. In No. 998, appellants Milky Way Productions, Inc. (hereinafter referred to as "Milky Way"), Al Goldstein and James Buckley are the publishers and editors of the weekly tabloid entitled *Screw, The Sex Review* (hereinafter referred to as *Screw*).

In No. 992, appellants New York Feed Company, Inc. (hereinafter referred to as "New York Feed") and Stephen Heller are the respective publishers of *The New York Review of Sex and Politics* (hereinafter referred to as *Review of Sex*). As a result of the publication, distribution and sale of various issues of both weeklies, the appellants, as

well as newsdealers and distributors commercially handling the tabloids, have been arrested for the crime of obscenity [New York Penal Law, §235.05]. Appellants allege no seizures of publications. The persons arrested were arraigned in the New York City Criminal Court on charges of promoting, or possessing with intent to promote, obscene materials as these terms are defined in Section 235.00 of the New York Penal Law. Prosecutions on these charges are currently pending in the New York City Criminal Court.

Appellee Frank S. Hogan is the District Attorney of New York County and is charged under state law with the prosecution of all crimes committed in New York County. Appellee Howard R. Leary is the Police Commissioner of the City of New York.

The Complaints Filed by Appellants

The complaint filed by Milky Way in the United States District Court for the Southern District of New York on August 18, 1969 alleged that appellants Goldstein and Buckley along with newsdealers and distributors were arrested on May 20, 1969, for publishing and selling issues 14 and 15 of the tabloid, *Screw*. Similar arrests, the complaint also alleged, were made on June 26, 1969, following the publication of issue 17, and August 15, 1969, following the publication of issues 22 through 24. Milky Way further alleged that because of these arrests, the sales of issues 18 and 19 of *Screw* decreased from 75,000 to 17,000 copies. Milky Way also alleged that the appellee Hogan, although asked to do so, refused to pursue alternative methods of dealing with the tabloids herein, such as informal consultations with appellants' counsel, delineating those areas of

expression not entitled to protection under the First Amendment.

The complaint of New York Feed, filed on September 3, 1969, alleged that appellant Heller, Sam Edwards, one of New York Feed's employees, Al Druss, the principal employee of New York Feed's distributing company, and various newsstand dealers were all arrested on June 26, 1969 for publishing and selling issue 9 of *Review of Sex*. All except Druss were arrested again on August 15, 1969, following the publication of issue 12. New York Feed further alleged that following the arrests of June 26, the circulation of *Review of Sex* decreased from 40,000 to 30,000 copies; and, allegedly, on August 25, 8,000 copies of issue 13 of *Review of Sex* were refused by newsstands.

Throughout the proceedings below, appellants have conceded, and, indeed, it is undisputed, that the arrest of each appellant was preceded by an independent judicial examination of the tabloids, which resulted in a finding of probable cause to believe that specific issues of *Sextet* and *Review of Sex* were obscene (affidavit of Patrolman Donald Gray, filed September 11, 1969).[1] Appellants alleged in their complaints, however, that the procedure authorizing the issuance of an arrest warrant upon an *ex parte* judicial determination of the subject matter claimed to be obscene violated their rights under the First and Fourteenth Amendments of the Constitution. It was argued that an arrest for the crime of obscenity could not be made in the

1. In each instance, as Mr. Gray's affidavit indicates, the criminal complaints charging appellants with obscenity were submitted to a judge in support of an arrest warrant [§148 CCP]. The complaints are annexed to Gray's affidavit. The resulting judicial determination supplied the basis for the arrest of new dealers.

absence of an adversary proceeding at which the appellants, or newsdealers, or distributors—or any prospective defendant in an obscenity prosecution—were entitled to litigate the issue of probable cause.

Appellants alleged further that the definition of obscenity contained in Section 235.00 of the New York Penal Law is unconstitutional on its face under the First Amendment. New York Feed also challenged as unconstitutional Section 235.10 of the Penal Law, providing that:

> "A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character."

Appellants sought permanent injunctive relief against the appellee Hogan as follows:

1. Milky Way sought an injunction prohibiting:

> "—any further arrests of newsdealers or [appellants] herein so long as the [appellants] publish copies of subject publication in the same character and format as that contained in Issues 17, 18 and 20, pending final resolution of the legal issues via the state courts, but with the right of [appellees] to proceed provided there is a radical departure from the standards and character of previous publications, enjoining [appellees] from making any arrests unless [appellees] negotiate in good faith with the [appellants] in accordance with the mandate of the Supreme Court of the United States prior to instituting any arrests to determine whether specific issues are obscene" (complaint of Milky Way, page 12).

Milky Way also sought a declaratory judgment that Sections 148 through 150 of the New York Code of Criminal

Procedure, statutes authorizing the issuance of arrest warrants by a judicial officer in a criminal case, were unconstitutional under the First Amendment in that they failed specifically to require an adversary hearing in advance of a person's arrest for selling an obscene publication.

2. New York Feed sought an injunction restraining future enforcement of the obscenity laws and further arrests of newsdealers, unless, prior to the issuance of an arrest warrant, a criminal defendant had the opportunity in an adversary proceeding to litigate the issue of obscenity concerning any publication which was the subject of a proposed criminal charge.

3. Appellants sought a declaratory judgment invalidating Section 235.00 (the definition of obscenity) of the New York Penal Law on its face; declaratory relief was also sought by New York Feed that Section 235.10 (the presumption of scienter) of the Penal Law was facially unconstitutional.

4. Appellants also demanded compensatory damages for economic losses incurred.

By motions, returnable in the District Court on September 16, 1969, appellants moved, pursuant to 28 U.S.C. §§2201, 2281 and 2284, for the convening of a three judge district court and for other temporary relief essentially similar to their prayers for final relief. The motion for a three judge district court was granted the next day (FRANKEL, D.J.), and the case was then argued before

Wilford Feinberg, Judge of the United States Court of Appeals for the Second Circuit and Marvin E. Frankel and Thomas F. Murphy, District Judges of the United States District Court for the Southern District of New York. The cases were decided jointly after the granting of a motion, upon the consent of the parties, to consolidate them for trial, pursuant to Rule 42 of the Federal Rules of Civil Procedure.

The Decision of the Court Below

In an opinion filed on October 15, 1969, the three judge district court denied completely all of the appellants' motions for temporary relief. Relying upon various decisions of this Court, the lower court rejected as untenable appellants' constitutional attack upon Section 235.00 of the Penal Law. Because of the inadequate record before it, the court did not reach the merits of New York Feed's contention that the presumption of scienter contained in Section 235.10 was irrational and hence unconstitutional [*cf. Leary v. United States,* 395 U.S. 6 (1969)]. Finally, the court also rejected on the merits appellants' claim that an arrest for the crime of obscenity must be preceded by an adversary hearing on that particular issue.

ARGUMENT

Since the attacks upon the New York statutes did not warrant the convening of a three judge court, this Court lacks jurisdiction to hear these appeals.

This Court lacks jurisdiction if the three judge court was improperly convened.

The appeal to this Court is taken pursuant to 28 U.S.C. Section 1253. But unless three judges were properly summoned to consider any of the appellants' claims, this Court lacks jurisdiction to hear these appeals [*Zemel* v. *Rusk*, 381 U.S. 1 (1965)]. Otherwise, a single district judge, by erroneously ruling that a particular claim warranted attention by three judges, could, in any case, vest this Court with appellate jurisdiction under Section 1253.

This is not a proper case for federal jurisdiction.

A threshold question at the outset of this appeal is whether the lower court properly decided to entertain this lawsuit on the merits. The complaints filed by both of the appellants sought equitable relief enjoining any future arrests that were not preceded by an adversary proceeding on the issue of obscenity, and declaratory judgments that certain penal statutes are unconstitutional under the First Amendment. Appellants did not ask the lower court to enjoin prosecution of the cases now pending in the Criminal Court, apparently recognizing that in the Southern District of New York, 28 U.S.C. Section 2283 constitutes a complete bar to federal intervention in pending state proceedings. See *Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546 (S.D.N.Y. 1969).

The lower court ruled that the allegations in the complaints were insufficient to establish federal jurisdiction, there being no particularized showing that the prosecutions and the arrests were or would be undertaken in bad faith [*Dombrowski* v. *Pfister*, 380 U.S. 479 (1965)]. Additionally, the court found that the appellants had deliberately bypassed the available remedies offered by the state courts, preferring instead to litigate criminal defenses in advance in the federal court (Appendix of New York Feed, pp. 29-30). Finding that the request for declaratory relief was appropriate, the court proceeded to a disposition of the case on the merits, omitting only to decide a question presented by the constitutional attack upon Section 235.10 (presumption of scienter) of the New York Penal Law.

Recognizing that federal interference with criminal cases in the state courts raises recurrent problems concerning the efficient administration of criminal justice, this Court, on December 10, 1969, noted probable jurisdiction in *Batchelor* v. *Stein*, No. 565, to consider whether a defendant who is being prosecuted under an allegedly unconstitutional state obscenity statute is entitled to injunctive relief under *Dombrowski*. But *Batchelor* as well as *Samuels* v. *Mackell*, No. 20, *Fernandez* v. *Mackell*, No. 11, and *Younger* v. *Harris*, No. 4, three cases set down for reargument during this term of the Court, raise a further problem, namely, whether 28 U.S.C. Section 2283 precludes a federal injunction against pending state proceedings, a question not previously decided by this Court. These particular problems are not raised by the pleadings below, since besides seeking declaratory relief from the prospective enforcement of state statutes, appellants sought to enjoin only future pros-

ecution and arrests [*Zwicker* v. *Koota*, 389 U.S. 241, 254 (1968)].

The issue thus delineated, it is clear that the lower court should have declined, in the exercise of sound discretion, to assert its jurisdiction. For, it is well settled that a federal court should decline to assert federal jurisdiction while there are pending criminal proceedings between the same parties where the claims sought to be litigated in the federal forum can be effectively determined by the state courts [*Douglas* v. *City of Jeannette*, 319 U.S. 153 (1942)]. No person is immune from criminal prosecution undertaken in good faith for the commission of alleged criminal acts. This is true even where there is not the slightest doubt that the constitutional contention asserted in the federal proceeding is correct. Thus, in *Douglas, supra*, this Court ruled that it was improper for a federal district court to entertain a suit seeking to restrain threatened enforcement of a state statute that the court had previously declared unconstitutional in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943). In the case at bar appellants' federal claims are not, to say the least, clearly correct. In enunciating the firm policy of noninterference by the federal judiciary with criminal litigation carried on in the state courts, this Court, in *Stefanelli* v. *Minard*, 342 U.S. 117, 124 (1951), pointed out the consequences of a contrary rule:

> "If we were to sanction [federal] intervention, we would expose every State Criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State Courts by resort to the federal forum, with review if need be to this Court, to determine the

> issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The claims propounded by the appellants herein are indistinguishable from those mentioned in *Stefanelli* and the First Amendment contention considered in *Douglas* for purposes of determining whether the lower court, in the first instance, could have exercised its jurisdiction. Granting of a declaratory judgment would have disrupted the pending state proceedings. The reasoning of *Stefanelli* mandated dismissal of the complaints without further consideration on the merits.

Undeniably, there are rare situations which may call for the assertion of federal jurisdiction while there are pending criminal proceedings between the same parties. But to justify such interference, there must be such an exceptional demonstration of irreparable injury that equitable relief is necessary to afford the adequate protection of constitutional rights [*Dombrowski* v. *Pfister, supra*]. Appellants failed completely to meet the burden of this requirement.

The core of the appellants' grievance is that the preceding arrests were performed in the absence of an adversary hearing on the issue of obscenity. Conducted without this safeguard, appellants claimed, the arrests prompted newsdealers, fearing additional arrests, to refuse any

further subscriptions of tabloids. Consequently, the circulation of the weeklies in New York County allegedly diminished to the point where New York Feed and Milky Way faced economic extinction. Against this background, however, as the lower court found, appellants "acquiesced in the postponement of the pending state criminal proceedings" and deliberately "neglected to press for their right to speedy state adjudications or even to raise in the state courts the issues of constitutional law they want this court to decide" (Appendix of New York Feed, p. 29). Indeed, the record establishes that a period of four months elapsed during which the appellants never sought to utilize the various procedural devices available in the state forum to vindicate their constitutional claims; the first arrests were made on May 20, 1969, while the initial complaint was filed in the District Court on August 18. Instead they chose "simply to bypass that avenue of relief in favor of seeking federal intervention. If such delay and disregard of state processes pending the arrival of self-inflicted 'emergencies' could meet the test for a federal injunction, the abrasive device would promptly lose its 'exceptional' character and would become a commonplace irritant" (*id.* at 30). Inaction by the appellants and their complete disregard for the state judicial processes surely refute any claim of irreparable injury, and the absence of such injury rendered the aid of a federal court unnecessary.

Beyond this consideration, appellants have failed to demonstrate that the arrests or prosecution were or will be undertaken in bad faith, an element which, under the *Dombrowski* case, must be sufficiently alleged before a federal court will decide to intervene. See also *Cameron* v. *Johnson,* 390 U.S. 611 (1968). Thus, even assuming the financial

plight of appellants (an assumption impeached by the widespread distribution and sale of their tabloids) the injury complained of is the normal injury incident to properly initiated prosecution. Intervention is required only in order to prevent that form of injury, resulting from extraordinary abuses in prosecution, which prevents a criminal defendant from asserting his constitutional defenses in the state forum. Thus, in *Dombrowski, supra,* there were specifically detailed allegations that, following an order granting a motion to suppress evidence illegally seized in a raid wherein plaintiffs were arrested and their offices ransacked, the plaintiffs were threatened with renewed prosecution, undertaken without any hope of success, under statutes plainly void under the First Amendment, for the sole purpose of inflicting harassment and intimidation upon the plaintiffs, suppressing their political views, and deterring them from exercising their civil rights. This Court held that by the very nature of these particularized allegations, the court in which the prosecutions were pending at the time of the appeal would not assure adequate vindication of constitutional rights. One of the two necessary ingredients, necessitating the aid of a federal court, was the allegation wherein:

> "* * * appellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities * * *" [*Dombrowski* v. *Pfister, supra* at 490].

In the present case, the passing and conclusory charge of bad faith is linked solely to appellants' legal contention that an arrest for obscenity must be preceded by an adversary hearing. But the alleged infirmity of a rule of criminal

procedure is by no means synonymous with bad faith. Indeed, the good faith of the appellees is demonstrated by the scrupulous withholding of prosecution in each instance pending a determination by a neutral and detached judge of the Criminal Court. And the appellees had a sound basis for believing that the criminal charges would be sustained, because a positive judicial finding of obscenity was made on five different occasions before an arrest warrant was issued. Further, no seizures were made, and the parties were free to continue distribution. Hence, the lower court found:

> "In any event, the requisite bad faith has not been shown. In fact, beginning with the prosecutions of the 'Screw' people in May, the papers and oral submissions give a convincing picture of careful, discriminating prosecutions in *good faith*" (Appendix of New York Feed, pp. 30-1).

Further, it can scarcely be maintained that *Dombrowski* permits a federal court to review on a piecemeal basis an arresting procedure that is supported by appellate court decisions [*cf. Stanford* v. *Texas,* 379 U.S. 476 (1964); *People* v. *Rothenberg;* 20 N.Y.2d 35 (1967)]. Otherwise, for example, a motion to suppress evidence, on whatever ground, might just as well be brought in a federal forum, thereby disrupting the orderly flow and process of litigation in the state courts. Since this Court has rejected this approach, judicial responsibility for handling such problems lies within the exclusive province of the state tribunals. Finally, the mere possibility of error during a criminal trial has never warranted the intrusion of a federal court, even under *Dombrowski*:

> "* * * It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court and that the mere possibil-

ity of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings" [*Dombrowski* v. *Pfister, supra* at 484].

Additionally, the considerations above dictate clearly that appellants' request for a declatory judgment that the state obscenity laws are unconstitutional also should have been denied without a review on the merits. Admittedly, the denial of an injunction does not foreclose the issuance of declaratory relief under appropriate circumstances [*Zwickler* v. *Koota*, 389 U.S. 241 (1968); *Douglas* v. *City of Jeannette, supra*]. But there was absolutely no demonstration of a compelling need for the lower court to become involved in a dispute already four months old. Quite the contrary, it has always been a long standing rule that, in the exercise of sound judicial discretion, declaratory relief should be denied where the identical issue is or may be raised in litigation pending between the same parties, as the present case demonstrates [*Abbott Labs.* v. *Gardner*, 387 U.S. 136, 155 (1967); *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112 (1962)]. Nor is such extraordinary relief available if the pending litigation between the same parties is a state criminal prosecution [*Henderson* v. *Trailway Bus Co.*, 194 F. Supp. 423 (E.D. W. Va. 1961), *aff'd*, 374 U.S. 488 (1963); *Richardson* v. *Dudley*, 295 F. Supp. 181 (S.D.N.Y. 1969)]. Quite apart from the belated assertion of their constitutional rights in the court below, appellants' prolonged silence vis-a-vis the state courts is sufficient to rebut what they characterize as exigent circumstances requiring the intervention of a federal court.

Too, while a declaratory judgment would have the same disruptive effect on state criminal processes as an injunction, there is no reason to believe that the New York courts will not give the closest scrutiny to the claims presented herein. If appellants' constitutional claims are correct, there is no showing that the state courts will reject them, or will not construe the state statutes to preserve their constitutionality [*People* v. *Rothenberg*, 20 N.Y.2d 35 (1967) (search warrant in obscenity case must particularly describe the items to be seized); *People* v. *Epton*, 19 N.Y.2d 496 (1967), *cert. denied, appeal dismissed*, 390 U.S. 29, *reh. denied*, 390 U.S. 976 (1968) (criminal anarchy statute construed to require proof of specific intent and clear and present danger); *People* v. *Finkelstein*, 9 N.Y.2d 342 (1961) (obscenity statute construed to require proof of the element of scienter)]. Thus, since the drawn-out nature of these proceedings dispels the need for immediate federal action, and since the state courts can adequately dispense relief if it should be forthcoming, the proper course of action for this Court to take is to dismiss the appeals without any consideration of the merits.

Even on the merits, there was no substantial federal question warranting the convening of a three judge court.

New York's statutory definition of obscenity is plainly valid.

As indicated in its opinion, the lower court took the position that the appellants' constitutional attack upon Section 235.00 of the New York Penal Law was of sufficient substance to justify the convening of a three judge court under 28 U.S.C. Section 2281 (Appendix of New York Feed, pp.

36-7). But since the arguments tendered below were plainly frivolous and have been rejected by decisions of this Court, the order convening the three judges should have been dissolved.

For, it is well settled that Section 2281 does not require the convening of a three judge court when the claim that a statute is unconstitutional is patently insubstantial [*Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965); *Bailey* v. *Patterson*, 369 U. S. 31 (1962)]; the federal question raised must be substantial [*Flast* v. *Cohen*, 392 U. S. 83, 91 (1968); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962); *Ex parte Poresky*, 290 U. S. 30 (1933)]. The convening of a three judge court is not an automatic ritual to be performed by the district judge in every instance where a litigant seeks to challenge the constitutionality of a state statute [*Boone* v. *Wyman*, 295 F. Supp. 1143, 1148 (S.D.N.Y. 1969)].

The New York obscenity statute contains the proper ascertainable standards of guilt, mandated by the decisions of this Court. Section 235.05 of the New York Penal Law states that:

> "A person is guilty of obscenity when, knowing its contents and character, he:
>
> 1. Promotes, or possesses with intent to promote any obscene material; * * *"

The term "obscene" is defined in §235.00 (1) as follows:

> "* * * Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, ex-

> cretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

These statutory provisions reflect precisely the standards contained in Supreme Court decisions governing obscenity prosecutions. These decisions define obscenity as follows:

> "Whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" [*Roth* v. *United States*, 354 U. S. 476, 489 (1957)].

Under this definition three elements must be proven. The prosecution must establish that (a) the dominant theme of the material taken as a whole appeals to prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value [*Redrup* v. *New York*, 386 U. S. 767 (1967); *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962)]. As indicated by the drafters of the Penal Law, the definition of "obscenity" contained in Section 235.00(1) incorporates fully and is identical with the federal standards enunciated in *Roth, Jacobellis, Redrup* and *Manual Enterprises, supra*. "Obscenity," then, embraces merely that form of expression which is beyond the purview of

the First Amendment.[2] It is difficult to perceive how the statute could possibly be repugnant to the Constitution. Indeed, this Court heretofore upheld the former New York obscenity statute whose standards were less particularized than the current provisions [*Mishkin* v. *New York*, 383 U. S. 502 (1966)].

However, appellants' attack upon Section 235.00, while novel, was completely without merit. Citing the *per curiam* decision in *Redrup* v. *New York*, 386 U. S. 767 (1967), appellants contend that a publication that is neither pandered, sold to a minor nor foisted upon an unwilling public, is entitled to protection under the First Amendment, regardless of its contents and distribution. They further assert that the absence of these three requirements in Section 235.00 renders it facially unconstitutional. Appellants misconstrue completely the holding in *Redrup*. There, this Court reversed a number of obscenity convictions, which, in the Court's judgment, could not be sustained under the standards now incorporated in the New York statute. While none of the convictions involved pandering, or the sale of material to an unwilling public or a minor, the absence of these facts was not considered critical to the reversals and did not serve as the basis of the Court's decision. Indeed, these hypothetical facts were explored by the Court only because the convictions were constitutionally defective under the traditional substantive

2. Section 235.15 of the Penal Law provides:

"In any prosecution for obscenity, it is an affirmative defense that the persons to whom allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, or governmental or other similar justification for possessing or viewing the same."

tests of obscenity contained in decisions beginning with *Roth* v. *United States*, 354 U. S. 476 (1957). The Court merely suggested that on a different set of facts the failure to meet those settled tests would not be fatal, if the prosecution was brought on a different theory.

Though agreeing with appellees' analysis herein, the lower court found appellants' claim substantial enough to be heard by three judges, for the reason that appellants' erroneous interpretation had won approval by a number of other federal district courts [see *United States* v. *4,400 Copies of Magazines, Etc.*, 276 F. Supp. 902 (D. Md. 1967); *Poulos* v. *Rucker*, 288 F. Supp. 305, 307 (M.D. Ala. 1968); *United States* v. *127,295 Copies of Magazines*, 295 F. Supp. 1186, 1188-9 (D. Md. 1968)]. These lower court decisions notwithstanding, they did not authorize the convening of a three judge court, in the face of clear pronouncements by this Court. For, "[t]he lack of substantiality on a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject" [*California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255 (1938)]. And clear pronouncements by this Court have rejected the notion that the three additional tests, posited by appellants on the basis of their reading of *Redrup*, are necessary elements in order for the prosecution to obtain an obscenity conviction.

Thus, in *Ginzburg* v. *United States*, 383 U. S. 463, 470-73 (1966), this Court ruled that evidence of pandering, for example, is relevant to a determination of the question of obscenity in a close case, but there was no suggestion that

pandering must be proved in addition to the other elements set forth in *Memoirs* and *Roth, supra* [see also *Memoirs* v. *Massachusetts*, 383 U. S. 413, 420 (Brennan, J. concurring); *Jacobellis* v. *Ohio*, 378 U. S. 184, 201 (Warren, C.J., concurring)].

The three-fold test of *Memoirs, Jacobellis* and *Roth* was recently reaffirmed by this Court in *Stanley* v. *Georgia*, 394 U. S. 557 (1969) where prosecution of obscene material was sanctioned regardless of the particular manner of distribution and the age of the buyer. There, this Court, in striking down a statute making the mere possession of obscene material a crime, unmistakably announced that the standards contained in *Roth* and its progeny continue to be perfectly viable:

> "Roth and the cases following that decision are not impaired by today's hearing. As we have said, the States retain broad power to regulate obscenity * * *" [*Stanley* v. *Georgia, supra* at 568].

This pronouncement emphatically refutes appellants' strained interpretation of *Redrup*.

Nonetheless, it is argued that the right to privately possess obscene material, upheld in *Stanley*, would be meaningless without the corresponding right to sell it, "absent, of course, a sale to a minor; pandering of the merchandise; or foisting it upon an unwilling public" (Jurisdictional Statement of New York Feed, p. 19). Thus, contends New York Feed, the holding in *Stanley* limits state regulation of obscenity to instances where materials are pandered, foisted upon an unwilling public or sold to a minor. But as *Stanley* itself indicates, this argument completely overlooks

an important distinction made in *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965). There, this Court held that use of contraceptives by married people was a fundamental constitutional right that could not be abridged by statute. But the Court recognized that while this right is absolute, different constitutional considerations apply to a statute forbidding manufacture of these devices. By the same token, in the present case, New York's power to regulate the sale of obscene material is not foreclosed by anything that was said in *Stanley*, as the reasoning in *Griswold* makes perfectly clear.

The constitutionality of the statutory presumption of knowledge does not raise a justiciable issue on the record before this Court.

Under Section 235.05 of the New York Penal Law, knowledge of the character or contents of a publication is a necessary element of the crime of obscenity to be proved by the prosecution. New York Feed attacks the constitutionality of Section 235.10 of the Penal Law, arguing that the statute contains a presumption of knowledge, applicable to persons selling obscene materials in the course of their business, that is allegedly irrational. But at this juncture of the proceedings, appellant lacks standing to attack the presumption on this ground. For, even assuming that such a challenge were successful, it would in no sense terminate the prosecution against appellants now pending in the New York City Criminal Court, which, of course, is the sole aim of this lawsuit. The District Attorney would still be entitled to continue prosecution on the obscenity charges and rely upon other evidence of guilt, apart from the presump-

tion, to establish the requirement of scienter. Thus, by deciding the constitutional question before it, this Court could do no more than render an advisory opinion, which would leave unchanged appellants' status in the New York courts.

Indeed, the pleadings filed in this case suggest the strong likelihood that the prosecution may find it unnecessary to invoke the procedural benefits of the presumption as part of its proof at trial. The complaints herein allege that the appellants are the editors and publishers of the tabloids in question; therefore, it is more than safe to assume that the appellants are intimately acquainted with both the character and contents of the newspapers, edited and published on a weekly basis. If this sort of evidence is developed at trial, the presumption now under attack may be totally irrelevant to the disposition of the criminal cases, and no real questions as to scienter will be presented [*cf. Mishkin* v. *New York*, 383 U. S. 502, 511 (1966)]. Beyond this, appellants have made absolutely no showing that they are even remotely affected by the statute they seek to challenge. In short, this is neither the proper time nor the proper case to consider the question presented.

In any event, the lower court wisely declined to consider the merits of New York Feed's argument, correctly reasoning, under this Court's decision in *Leary* v. *United States*, 395 U. S. 6 (1969), that the rationality of the presumption could not be determined in the absence of a full "empirical" inquiry on that question [*United States* v. *Gainey*, 380 U. S. 63, 67 (1965); *cf. United States* v. *Romano*, 382 U. S. 136 (1965); *see Turner* v. *United States*, —— U. S. ——, 6 Cr.

L. 3040 (1970)]. As the lower court explained, the resolution of this question "entails the exploration of facts which a legislature has either investigated or otherwise learned about, * * * and which judges cannot notice or pretend to know better merely because of their isolated offices. So, for example, in *Leary*, upon which [appellants] pitch this contention, the Court explored reams of factual material * * *, and relied upon a district court *record* made before a judge concerned with the same problem" (Appendix of New York Feed). Factual allegations, in sufficient detail, and investigation, must precede judicial solutions in this type of case, for the rationality of a statutory presumption does not present what can be described as a pure question of law. Appellants offer no allegations, request no hearing, but merely claim that the statute is unreasonable on its face. Thus, in view of the total inadequacy of the record before it, the lower court cannot be faulted for refusing to resolve this question.

Unsatisfied with this disposition, New York Feed argues, relying upon *Smith* v. *California*, 361 U. S. 147 (1961), that the presumption of knowledge contained in Section 235.10 is inherently irrational. But *Smith* never reached such a determination and held merely that the Constitution prohibits a state from imposing criminal liability for the sale of obscene material without proof of the mental element of scienter. Section 235.05 of the Penal Law, as the practice commentary by the drafters indicates, comports fully with this ruling. That section requires the prosecution to prove beyond a reasonable doubt that a person who sells or promotes an obscene publication knows its contents and character; the rebuttable presumption of knowledge, of course, is an aid that the prosecution may avail itself of in a par-

ticular case. Whether the presumption is rational has never been decided by this Court, appellants' argument to the contrary.

The constitutionality of the State arrest warrant statutes is not properly challenged.

Appellant Milky Way contends that its attack upon the constitutionality of the arrests in the present case is also an attack upon the constitutionality of Section 148, 149, 150 of the New York Code of Criminal Procedure, which thereby required the convening of a three judge court under 28 U.S.C. Section 2281. As found by the lower court, this contention is incorrect (Appendix of New York Feed, p. 36). For the issue whether there is a right to an adversary hearing prior to an arrest in an obscenity case is in no way posed by these statutory provisions. These provisions merely authorize the issuance of an arrest warrant by a court upon a showing of sufficient proof. But the statutes are not addressed to the constitutional issues sought to be raised herein and neither require nor preclude the unique procedure demanded by Milky Way. Additionally, it cannot be successfully argued that the constitutionality of the statutes is brought into controversy simply because they bestow the authority upon the appellees to procure an arrest warrant. This was recognized in *Phillips* v. *United States*, 312 U. S. 246, 252 (1940), where this Court stated:

> "Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification."

Thus, in the present case, we are not at all concerned whether the provisions of the Code of Criminal Procedure authorize or fail to authorize an adversary hearing prior to an arrest in an obscenity case. What is complained of here is the validity of an arrest in a specific instance. The resolution of this dispute will be governed solely by considerations under the First and Fourth Amendments [*Cooper* v. *California*, 386 U. S. 58, 61 (1967); *Tyrone* v. *Wilkinson*, 410 F.2d 639, 643 (4th Cir. 1969); *cf. Ex parte Bransford*, 310 U. S. 354, 361 (1940)]. Otherwise, for example, every motion to suppress evidence procured by an unlawful search and seizure would always require a holding that the particular statute authorizing the search is unconstitutional. But this Court has consistently rejected this approach in the course of its review of search and seizure cases [*Sibron* v. *New York*, 392 U. S. 40 (1967); *Cooper* v. *California*, *supra*; *Preston* v. *United States*, 376 U. S. 364 (1964); see also *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) (compelled confession)]. Apart from the statutory authority to conduct a search, review is limited to a determination whether, on the facts and circumstances of a particular case, a search is reasonable under the Fourth or, in some cases, the First Amendment [*Stanford* v. *Texas*, 379 U. S. 476 (1964); *Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964); *Marcus* v. *Search Warrants*, 367 U. S. 717 (1961)]. This was explained in greater detail in the *Sibron* case, where the constitutionality of the New York "stop and frisk" law was attacked "on its face." In delineating the proper scope of review, this Court, however, declined

> "to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of §180-a next to the categories of the

Fourth Amendment in an effort to determine whether the two are in some sense compatible * * *

"Section 180-a * * * deals with the substantive validity of certain types of seizures and searches without warrants. It purports to authorize police officers to 'stop,' people, 'demand' explanations of them and 'search [them] for dangerous weapon[s],' in certain circumstances upon 'reasonable suspicion' that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of §180-a are not categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations" [*Sibron* v. *New York*, *supra* at 59-60].

Similarly, in the present case the legislature's sole purpose in the enactment of Section 150 of the Code of Criminal Procedure was to assure that magistrates do not issue arrest warrants unless they are satisfied that a crime has been committed. As in *Sibron*, the "category" upon which the statute focuses cannot be compared with the requirements of the First Amendment. Consequently, the constitutionality of the statute is not presented by Milky Way's attack upon the legality of particular arrests.

The arrests of appellants' customers pursuant to warrants raise no question under the First Amendment, and appellants lack standing to challenge them.

Although each arrest occurred pursuant to a warrant based upon judicial review of the subject publication which resulted in a finding of probable cause to believe that a crime had been committed, appellants argue that the arrests were defective, since they were not preceded by an adversary hearing on the issue of obscenity. This argu-

ment is wholly without legal support, and raises no substantial federal question. [*Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546 (S.D.N.Y. 1969)].

At the outset, it should be observed that appellants lack the requisite standing to raise this question. The essence of the appellants' argument is that the arrest of a newsdealer for selling a particular publication purchased by him from appellants inhibited the newsdealer from purchasing subsequent issues of the same tabloid. This inhibition, it was claimed, resulted in a prior restraint upon the publication in question, which thereby reduced the overall circulation of the tabloids. It is against this background that appellants predicate their right to an adversary proceeding before they can be arrested. It is not claimed, however, that the appellants, when arrested, were inhibited from disseminating further issues of either *Screw* or *The Review of Sex*. Appellants have always been eager and ready to market and distribute their product. Instead, the First Amendment claim asserted herein is derived solely from the contention that the inhibitory effect of an arrest upon a newsdealer, reducing the circulation of the tabloids, requires that appellants be given a preliminary adversary proceeding. In effect, then, appellants are seeking to attack the arrests of the newsdealers, not their own. But if the newsdealers' arrests were performed in violation of the First Amendment, the right to advance this argument belongs to the newsdealers and not the appellants. Thus, the question before this Court can only be decided in a proceeding where the newsdealers, themselves, collectively seek to raise it.

Indeed, this Court has repeatedly held that constitutional rights are personal rights and cannot be "vicariously asserted" [*Alderman* v. *United States*, 394 U.S. 165, 174 (1969); see *Tileston* v. *Ullman*, 318 U.S. 44 (1943); *Jones* v. *United States*, 362 U.S. 257 (1960); *cf. Pierce* v. *Society of Sisters*, 268 U.S. 510 (1924); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923)]. In the *Alderman* case, it was decided that a criminal defendant cannot object to the introduction of evidence seized in violation of the Fourth Amendment rights of another person. Analogously, the appellants should not be permitted to interrupt the prosecution pending against them in the state courts simply because an arrest of a third party may be defective. In *Tileston*, the Court held that a physician would not be permitted to challenge the constitutionality of a state statute proscribing the use of contraceptive devices by married people, which allegedly prevented him from giving medical advice to his patients. Interestingly, this result was reached despite the fact that the statute under attack had an allegedly inhibitory effect upon the practice of medicine. Of course, appellants in the present case are not so similarly inhibited by the arresting procedures employed by the appellees. Moreover, appellants' relationship with the newsdealers is contractual and not representative, as was the situation in *NAACP* v. *Alabama ex rel Patterson*, 357 U.S. 449 (1958). And we need not be concerned in this case with sanctioning a judicial policy that encourages racial discrimination [*cf. Barrows* v. *Jackson*, 346 U.S. 249 (1953)]. Clearly, then, the question sought to be raised before this Court should not be decided in this proceeding.

In any event, appellants' argument is totally lacking in substance. For, a simple arrest is in no way determinative

of the ultimate issue of guilt or innocence. Nor were the instant arrests utilized to remove from circulation, by way of incidental seizure, mass quantities of literary materials. Rather they fulfilled the limited purpose of bringing before the court for formal charges and arraignment persons accused of a crime. Every individual so charged is adequately protected by the procedural safeguards of the Criminal Court and the important assurance that he will receive a prompt trial and appeal. No more can reasonably be expected, for, if a prospective criminal defendant is given the right to litigate whether, in the first instance, he can be properly charged with a crime, the District Attorney's or the grand jury's right to initiate prosecution no longer exists.

Moreover, the decisions cited by the plaintiffs as controlling have no relevance to the issue at bar. For example, in *Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), a civil procedure for the issuance of a search warrant had been used to impound 1715 books without more than the magistrate's cursory perusal of 7 titles, which in the words of the Supreme Court was "more repressive than an injunction preventing further sale of the books" [*Quantity of Books, supra* at 210]. Accordingly, confiscatory seizure of this type in the absence of an adversary judicial determination was held to be improper. In *Bee See Books* v. *Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968), a prior restraint upon the sale of books was imposed by the deployment of uniformed police officers in retail outlets to uncover pornography. This practice, by discouraging prospective purchasers from entering the store, deprived the bookseller of his right to distribute material not previously the subject

of a judicial ruling on the issue of obscenity. As is clearly evident, these and other decisions cited by the plaintiffs are of little aid in appraising the constitutionality of the procedure employed in the conduct of an arrest. Each of these cases involved an auxiliary means of suppressing publications which was found to be imperfect. At issue were procedures designed to enjoin from distribution without proper safeguards materials arguably protected under stringent standards of the First Amendment. An arrest, on the other hand, merely initiates criminal charges and brings a criminal defendant to trial. No issue of a prior restraint against a publication is presented, for the publisher's right to sell and society's right to receive the material is not impaired by the simple temporary detention of the accused. Clearly, an arrest is but merely one part of the penal process which, after the event in question takes place, reviews conduct that the state has reason to believe was prohibited.

This was the precise conclusion reached in *United States* v. *Wild*, —— F:2d —— (2d Cir. 1969) (N.Y.L.Jour. December 1, 1969 p. 1, Column 7). There, the defendants were lawfully arrested in their apartment pursuant to a bench warrant issued after the return of an indictment, charging violations of the federal obscenity law. A search of the premises was then conducted incident to the arrest, and a number of items were seized, including photographs and film, allegedly obscene. The Court of Appeals rejected the argument that the absence of an adversary proceeding invalidated the seizures, holding that both *Quantity of Books* and *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961) were "inapposite," since they were concerned merely with

"massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings authorizing their destruction." These decisions, the court went on, cannot "be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases" [*United States* v. *Wild, supra*]. The legality of the arrests in the present case also finds support in *Mishkin* v. *New York*, 383 U.S. 502, 513 (1966). In *Mishkin*, this Court refused to pass on the identical contention raised in *Wild*, since the appellate record did not satisfactorily indicate whether the seizures complained of were "of a massive quality." By abstaining from review, the Court implicitly acknowledged that an adversary proceeding is not necessary to sustain the legality of every search or arrest. Otherwise, the Court would have decided the question before it irrespective of the inadequacy of the record concerning the actual number of items seized.

In a curious argument, however, appellants contend that the arrest, like an injunction, prevented the dissemination of subsequent issues of their newspapers. Thus, for example, Milky Way asserts that certain newsdealers, arrested for selling issue 17 of *Screw*, refused to subscribe to the two following issues, 18 and 19, neither of which was ever the subject of judicial review. Consequently, the sales of these two editions of the paper allegedly decreased. New York Feed also points out that after newsdealers were arrested for selling issues 9 and 12 of *The Review of Sex* the circulation of this tabloid diminished. Their contention, then, is that the arrests operated as a prior restraint upon the distribution and sale of subsequent issues of the two

tabloids. This argument is totally without merit and represents no more than an improper characterization of the effect of the arrests upon the resultant conduct of newsdealers.

Quite clearly, even under the facts alleged, the arrests merely inhibited some newsdealers from purchasing materials similar to those which were presently the subject of a pending prosecution. This alleged inhibitory effect, followed by the ensuing reduction in the circulation of the newspapers, is not attributable to the State, but, instead, is a normal consequence of the newsdealers' decision to perform those voluntary steps which they deem necessary to comply with the law. As this Court is well aware, newsdealers in the present case are confronted with the difficulties in the application of the law to a publication offered to them for sale, which is simply an inherent problem attendant in the dissemination of any publication bordering on obscenity. A determination that a particular work is obscene depends upon the facts and circumstances of each case. Often it cannot be predicted with certainty whether a given form of expression lies within the protected area of the First Amendment. Conscious of this unfortunate predicament, the Supreme Court has nonetheless held that the *in terrorem* effect of an arrest similar to those herein is unavoidable and of no constitutional significance. In *Smith* v. *California,* 361 U.S. 147, 154 (1959), the Court observed that:

> "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect upon the dissemination of material not obscene."

In short, the jeopardy faced by the arrests is no more than the restraint of the obscenity law itself, which thereby leads to self-censorship, at the option of the newsdealers, in respect to future editions of the appellants' newspapers. Contrary to their arguments, this phenomenon does not raise any question concerning a prior restraint.

Moreover, appellants' contentions, if accepted, would lead to absurd consequences. For example, for reasons which are quite obvious, federal and state grand juries would no longer be able to return indictments against individuals for using the mail to transport obscene material. Further, the trial of a bookseller would have to be conducted under conditions of strict secrecy in order to eliminate any possible inhibitions upon his competitors. Indeed, an adversary hearing to determine whether there is probable cause to make an arrest would have the same inhibitory effect as the arrests in the present case allegedly had. Appellants attempt to answer this argument in two ways. New York Feed argues:

> "Only in an adversary form will the investigating magistrate be adequately advised of both the authorities and reasons why the questioned publication is not obscene." [Brief for New York Feed filed in the lower court at p. 11.]

This contention, which is no more than an assertion that the materials currently being prosecuted are not obscene, has no bearing on the question whether the procedures employed in the conduct of the arrests were proper. The issue of the appellants' guilt or innocence should be determined only in a trial in the state courts. This argument, therefore, is without merit. Milky Way takes a differ-

ent approach. It argues that the adversary proceeding would have the sole purpose of framing guidelines for the future conduct of newsdealers. Thus, appellants' position is that a hearing during which a court determines that a publication is probably obscene would nevertheless immunize newsdealers from the penal effects of all sales made prior to the court's ruling. Following the hearing, the newsdealers would have the opportunity to comply with the law by returning the illegal merchandise to the publisher, or, after making additional sales, face prosecution and rely on a defense that the material is not obscene. This contention is absurd. For obviously, to have any significance in the enforcement of the criminal law, the court's finding of probable cause would require the immediate arrest of alleged offenders. Under the scheme envisioned by Milky Way, results of the adversary proceeding would serve as an advisory opinion which, in all reality, would preclude the need forever of the District Attorney to prosecute violators of the obscenity laws. In effect, the essence of appellant's frivolous argument is that he is entitled forever to "one bite out of the apple," each time an apple ripens on the forbidden tree. The First Amendment does not require immunity from prosecution under state and federal obscenity laws. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Finally, Milky Way argues that the arrests of newsdealers were improper since the State has at its disposal other methods of attacking obscene material. This contention requires little refutation. Suffice it to say, regardless of these supposed alternatives, the State has the right to enforce its own laws making it a crime to promote

obscenity. Additionally, the plaintiff argues, citing *Bantam Books* v. *Sullivan*, 372 U.S. 58, 71 (1963), that private consultation between law enforcement officials and newsdealers is required before the District Attorney can initiate a criminal proceeding. However, the Court's mention of preliminary negotiations was intended as a suggestion only and not a constitutionally required device which must precede prosecution.

Conclusion

The appeal should be dismissed, or in the alternative, the order below should be affirmed.

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February, 1970

SUPREME COURT, U. S.

FEB 24 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. 992.

NEW YORK FEED CO., INC., and STEPHEN HELLER,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

No. 998.

MILKY WAY PRODUCTIONS, INC., JAMES BUCKLEY and AL GOLDSTEIN,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

Supplemental Brief of Appellants, Milky Way Productions, Inc., *et al.*, and New York Feed Co., Inc., *et al.*, Pursuant to Rule 24(5).

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1970

(3587)

IN THE

Supreme Court of the State of New York

OCTOBER TERM, 1969.

No. 992

NEW YORK FEED CO., INC., and STEPHEN HELLER,

Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,

Appellees.

No. 998

MILKY WAY PRODUCTIONS, INC., JAMES BUCKLEY and AL GOLDSTEIN,

Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,

Appellees.

Supplemental Brief of Appellants, Milky Way Productions, Inc., *et al.*, and New York Feed Co., Inc., *et al.*, Pursuant to Rule 24(5).

On February 23, 1970, there came to the attention of appellants' counsel, and on February 25, 1970, appellants' counsel obtained a copy of a decision of February 12, 1970, entitled *Robert Krahm, et al., v. Milton Graham, et al.*, ___ F. Supp. ___ (D. Ariz. No. Civ. 69-392 Phx. WEC Feb. 12, 1970) (Walter E. Craig, J.).

Plaintiffs in that case were the owners and employees of bookstores in the City of Phoenix. Defendants were the former Mayor, the Chief of Police and the City Prosecutor. The court permanently enjoined the defendants:

1. "from the further prosecution of any pending criminal actions instituted pursuant to A.R.S. Section 13-532 against these plaintiffs which were not preceded by an adversary judicial hearing on the question of obscenity."

2. "from the institution of any future criminal actions under A.R.S. Section 13-532 against these plaintiffs in the absence of a prior adversary judicial hearing on the question of obscenity."

Insofar as this decision is not yet reported, appellants here quote the entire portion of the opinion dealing with prior adversary hearing starting with page 4 of the unreported opinion to the end:

Prior Adversary Hearing.

"What must the defendants do to insure the adequate protection of plaintiffs' First Amendment rights?

> 'Because the line between protected and unprotected speech, under the First Amendment, is so difficult to draw, and because First Amendment rights are of such fundamental importance to our system of government, the Constitution requires a procedure "designed to focus searchingly on the question of obscenity" before speech can be regulated or suppressed. *Marcus v. Search Warrants*, 367 U. S. 717, 732, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127.' *Cambist Films, Inc., v. Tribell*, 293 F. Supp. 407.

In order to focus on the question of obscenity without encroaching on constitutionally protected expression, the states must employ 'sensitive tools' which will 'em-

body the most rigorous procedural safeguards.' *Bantam Books, Inc., v. Sullivan*, 372 U. S. 60, 66, 83 S. Ct. 631, 637. In this area of procedure the Supreme Court has frequently held that seizures of allegedly obscene material without an independent determination of obscenity by a judicial officer or a prior adversary hearing are unconstitutional. *Marcus v. Search Warrants, supra*; *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205, 211, 84 S. Ct. 1723, 12 L. Ed. 2d 809; *Lee Art Theatre v. Virginia*, 392 U. S. 636, 88 S. Ct. 2103.

The procedure of requiring a prior adversary hearing has recently been extended by federal district courts to cases where, 'even in the absence of seizure, threats of criminal prosecution by police officers or other administrative officials can constitute an all too effective prior restraint.' *Poulos v. Rucker*, 288 F. Supp. 305, 310. See also *Delta Book Distributors, Inc., v. Cronvich*, 304 F. Supp. 662; *Sokolic v. Ryan*, 304 F. Supp. 213.[2] This recent trend would appear to be entirely consistent with the Supreme Court's earlier opinion in *Bantam Books, Inc., v. Sullivan, supra.*

Delta Book Distributors, Inc., v. Cronvich, supra, pointed out the illogic of trying to distinguish between cases where actual seizure and arrest have occurred and those where only that 'threat' of such action is involved. In either case a prior restraint upon the exercise of First Amendment rights can be effectively exerted. The threat of pending criminal prosecutions is no different. 'The idea that a criminal prosecution and threats or probability of further prosecutions does not chill one's First

[2]In *Sokolic, supra*, Judge Lawrence by supplemental order withdrew his adoption of *Delta, supra*, when the same issue was decided to the contrary by his brethren in the Middle District of Georgia. *Carter, et al., v. Gautier, et al.*, F. Supp. . No reason other than the existence of the contrary result was given for the change of position.

Amendment rights is judicial illusion.' *Sokolic, supra,* at 215. It would be illogical to contend that the multitude of pending prosecutions in the case at hand had no chilling effect.

This Court is in agreement with the principle adopted in *Delta, supra,* that '"[t]he dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. [Citations omitted.]"' At page 667 (quoting from *Cambist Films, supra*). Such a procedure should provide for immunizing alleged violators from criminal liability prior to an adversary judicial determination of the fact of obscenity. *Delta, supra.*

It is essential that the difficult determination as to what is obscene should not be made by law enforcement officers. 'It suggests no disrespect for competent police officers to insist that in this sensitive area decisions be made according to a more rigorous standard employed by more expertly trained hands.' *Poulos v. Rucker, supra,* at 309.

Defendants argue that the chilling effect of a prior adversary hearing is as great as a criminal prosecution. The Court is aware that even a prior adversary hearing imposes some chill on potentially protected activities. All prior restraint cannot be avoided. *Delta, supra,* at 667. This Court doubts that the inhibition created by the prior adversary hearing is more than a modicum of the burden imposed by a criminal proceeding at which both the obscenity *vel non* of the questioned material and criminal liability are determined simultaneously.

Defendants further argue that the nature of the material involved, that is, many separate titles together with a very short shelf life, necessarily means that by the

time an adversary determination of the fact of obscenity is made there will be nothing left against which to take action. This understates the flexibility of an adversary hearing and misunderstands the preferred position of First Amendment rights. The Court is aware that, except for the superficial titles, most of the publications involved in this case are virtually indistinguishable. There is no reason why a single adversary hearing may not entertain many different titles of essentially the same textual material.

In view of the decision reached herein, this Court expresses no opinion on the applicability of *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414, to Arizona's obscenity statute. Nor does this Court express an opinion as to whether defendants have adduced sufficient evidence of plaintiffs' 'Scienter' to achieve a proper conviction under the obscenity statute. The Court finds no reason at the present time to redress any alleged attempts on the part of defendants to influence judicial and public opinion against plaintiffs.

IT IS ORDERED, ADJUDGED AND DECREED that defendants be permanently enjoined from the further prosecution of any pending criminal actions instituted pursuant to A.R.S. Section 13-532 against these plaintiffs which were not preceded by an adversary judicial hearing on the question of obscenity.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants be permanently enjoined from the institution of any future criminal actions under A.R.S. Section 13-532 against these plaintiffs in the absence of a prior adversary judicial hearing on the question of obscenity.

Dated this 12th day of February, 1970."

With reference to the district court's opinion and decision quoted above, appellants note:

1. The district court's determination and conclusion did *not* turn on any demonstration that prosecutions were undertaken in bad faith.

2. The district court's opinion correctly pointed out, as appellants' jurisdictional statement pointed out, that the inhibition created by prior adversary hearing does not begin to equal the suppressive effects of fully matured criminal actions at law, and at the same time prior adversary determination with its flexibility would not result in hobbling obscenity law enforcement.

This supplemental brief will be printed.

The motions of appellees should be denied, and the Court should hear plenary argument.

February 26, 1970.

Respectfully submitted.

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SUPREME COURT, U. S.

1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. 992.

NEW YORK FEED CO., Inc., and STEPHEN HELLER,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

No. 998.

MILKY WAY PRODUCTIONS, Inc., JAMES BUCKLEY and AL GOLDSTEIN,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

Brief of Appellants, Milky Way Productions, Inc., and New York Feed Co., Inc., in Opposition to Motions to Dismiss or Affirm.

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THE RECORD COMPANY, Inc., New York, N. Y. 10007—212 732-6978—1970

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In the

Supreme Court of the State of New York

October Term, 1969.

No. 992

New York Feed Co., Inc., and Stephen Heller,

Appellants,

against

Howard R. Leary and Frank S. Hogan,

Appellees.

No. 998

Milky Way Productions, Inc., James Buckley, and Al Goldstein,

Appellants,

against

Howard R. Leary and Frank S. Hogan,

Appellees.

Brief of Appellants, Milky Way Productions, Inc., and New York Feed Co., Inc., in Opposition to Motions of Appellees to Dismiss or Affirm.

I. The Procedural Arrest Warrant Statutes, C.C.P. 148-150, are unconstitutional as applied in law to borderline publications.

(Appellant Milky Way's Jurisdictional Statement Point II.)

On Monday, February 16, 1970, five months after the motions were made, the Criminal Court, New York County, rendered its decision on the motions of defendants Jim Buckley and Al Goldstein, principals of Milky Way Productions, Inc., publishers of Screw, The Sex Review, and the companion motions of Stephen Heller and Sam Edwards, the principals of New York Feed Co., Inc., publishers of the New York Review of Sex.

The Criminal Court rendered no opinion. The court denied Screw's motion to dismiss and a trial date was fixed, but held the two issues of the New York Review of Sex were not obscene. The court also without opinion denied motions that the New York statute was unconstitutional as overbroad (Point I of appellant Milky Way's jurisdictional statement) and that the arrest warrant statutes as applied as a matter of law were unconstitutional (Point II of appellant Milky Way's jurisdictional statement).

The New York Review of Sex, a relative newcomer to the field, should be pleased at being declared not obscene on motion. There is only one problem: The arrest warrant statutes as applied as a matter of law on the undisputed facts, as set forth in appellant Milky Way's jurisdictional statement, totally destroyed the publication and put it out of business, even though it was not obscene. Exactly what we said would happen did happen.

Appellees do not question any part of our statement of facts, or that upon the issuance of the warrant:

1. The publication issue which is the subject of the warrant becomes contraband, is deemed illegal, and obscene, and hundreds or thousands of copies of that issue will not be sold by anyone.

2. Newsdealers will not sell subsequent issues, by the thousands.

3. When repeated, the publication itself is destroyed, which is exactly what happened to the New York Review of Sex, and will happen to Screw, long before Screw can fight out the legal issues via the state courts. The very danger envisaged by *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964), happened, a nonobscene publication was suppressed and destroyed by *ex parte* judicial ruling procedures.

On October 9, 1969, still another federal district court held there could be no criminal prosecutions unless "it is preceded by an adversary hearing with full notice to defendant." *Drive In Theatres, Inc., v. Huskey*, 305 F. Supp. 1232, 1236 (W.D. No. Car. Oct. 9, 1969).

This legal issue is properly the subject of a three-judge court. Appellants do not complain just about the particular arrests, or the words of the statute, or how it might be applied, but how it was, is and will be applied as a matter of law. Enjoining the operation of a state statute historically was the reason for requiring three judges.

Appellants have standing. While appellants complain about arrests of newsdealers without any warrants for their arrests, it is appellants' newspaper issues which become contraband and are suppressed upon the *ex parte* judicial ruling.

The legal issues here involved go far beyond obscenity laws. Long after arguments over obscenity have passed into ancient history, if the lower court decision is not reversed, there will be embedded in the body of American jurisprudence one of the most vicious and pernicious procedural precedents which has ever threatened First Amendment rights. Today it is a publication which borders on obscenity; tomorrow it will be a publication bordering on some other illegality.

II. Penal Law, Section 235.00(1), is overbroad.

(Appellant Milky Way's Jurisdictional Statement Point I.)

In *United States of America, plaintiff; v. Thirty-Seven (37) Photographs, defendants, Milton Luros, claimant,* F. Supp. (C.D. Calif. Jan 27, 1970 Civil 69-2242-F) (three-judge court), Luros, claimant, had imported 37 photographs, hard-core, admittedly for *commercial* distribution. The three-judge California district court, based on *Stanley v. Georgia*, 394 U. S. 557 (1969), and citing *Karalexis v. Byrne*, F. Supp. (D. Mass. Nov. 28, 1969 Civil 69-665-J), directed customs officials to "deliver such photographs to the claimant," and held 19 U. S. C. 1305 unconstitutional.

While the case dealt with the federal import statute, it supports appellants' position (Point I appellant Milky Way's jurisdictional statement).

This memorandum of law will be printed. Appellees' motion should be denied.

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